A TREATISE

ON

FRAUDULENT CONVEYANCES

AND

CREDITORS' BILLS,

WITH A DISCUSSION OF

VOID AND VOIDABLE ACTS.

BY

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SECOND EDITION.

Revised and Enlarged.

NEW YORK:

BAKER, VOORHIS & CO., LAW PUBLISHERS.

66 NASSAU STREET.

1889.

E. O. Jenkins' Sons, Printers,
New York.

PREFACE TO SECOND EDITION.

THE second edition of this work was called for over two years since, but other professional engagements of the writer seemed to render an earlier appearance of the volume impossible. Numerous additions have been embodied in the original text, a number of new sections have been written, and the citations of authorities increased about one thousand cases over the number contained in the first edition. By enlarging the size and increasing the number of the pages it is estimated that over one hundred pages of new matter will be found embodied in this edition. Special efforts have been put forth to utilize the latest important authorities bearing upon the topics discussed. The multitude of recent cases involving fraudulent alienations and covinous schemes devised to defeat the claims of creditors, demonstrates how important and far-reaching the subject under consideration has become. Sometimes a creditor's entire fortune is dependent upon a correct exposition of the statute of Elizabeth. The writer is confirmed in his early conviction that the policy resulting in a relaxation of remedies against the person which an enlightened civilization seemed to demand, has created a numerous and very obnoxious class of what may be called professional fraudulent debtors. These unworthy persons usually display much skill in evading the sharp edges of the criminal law, but they nevertheless continue to depredate upon the sacred property rights of their fellow-men. Some

new barrier should be erected for the protection of honest people.

We desire to acknowledge the great kindness of professional friends in various sections of our country.

ASTOR BUILDING, 10 WALL STREET.
NEW YORK, *Sept.*, 1889.

PREFACE TO FIRST EDITION.

RECENT innovations in civil procedure have effected important changes in the remedies of creditors in proceedings instituted to convert equitable assets or to reach property fraudulently alienated or held under a secret trust for the debtor. The aim of this treatise is to furnish suitors with a practical guide in this class of litigation. The earlier statutes and decisions concerning fraudulent alienations to defeat creditors have been noticed; the debtor's rights and interests in property available to creditors have been considered; and the different forms of remedies or of procedure which may be invoked either at law or in equity; the status essential to entitle a creditor to maintain a bill; questions of parties, complainant and defendant; of pleading; the form and effect of the judgment; and the rules regulating provisional relief, reimbursement and subrogation, have been treated, the discussion embracing both chancery practice and the reformed procedure.

The discussion, however, has not been limited to the details of practice or procedure. Chapters have been devoted to the subjects of intention, consideration, and *indicia* of fraud; to the important questions relating to change of possession, and generally to evidence and defenses as appertaining to these suits. The rules applicable to frauds upon creditors springing out of the relationship of husband and wife, and relative to covinous general assignments and fraudulent chattel mortgages, have been examined, and the doctrine of spendthrift trusts discussed. Special pains have been taken in the treatment of the law of notice, actual and constructive, as applied to our subject.

One of the chief aims of a work of this kind is to bring side by side the decisions in different States upon kindred questions and construing similar statutes. Federal authorities have been frequently quoted, cited, and relied upon, because more universally accredited, and in pursuance of a belief that such a policy tends to render the body of our law more symmetrical and harmonious. Still, the great mass of the decisions collated and discussed has been drawn from the courts of last resort in the various States.

It is needless to repeat the criticisms advanced in the body of the work upon the tendency manifested in certain authorities to close some of the sources of relief formerly available to complainants. The creditor's power to imprison the debtor or inflict personal punishment upon him, and coerce payment in that way, is practically destroyed; hence, we urge, remedies against property rights and interests should be strengthened and perfected. A policy under which a debtor can enjoy "a beneficial interest in property by such a title that creditors cannot touch it" is not to be encouraged or commended.

The chapters devoted to Void and Voidable Acts do not entirely reflect the author's original design. The lack of available space, the pressure and anxiety incident to active practice, and other causes, necessitated the publication of that portion of the work in its present compressed form. The topic was suggested by the main discussion (see § 408), and is believed to be not wholly out of place in this volume.

NEW YORK, *May*, 1884.

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FRAUDULENT CONVEYANCES

AND

CREDITORS' BILLS.

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CHAPTER I.

INTRODUCTORY OBSERVATIONS.—GROWTH OF THE LAW CONCERNING FRAUDULENT CONVEYANCES.—PHASES OF THE SUBJECT.

§ 1. Severity of the Roman law—Modern changes.
2. Prevalence of fraudulent transfers—The cause.
3. Scope of the inquiry.
4. Forms of relief.
5. } Onus as to fraud—Suspicions
6. } insufficient—Absence of presumptions.
7. Judge Black's views.
8. Proof of moral turpitude.
9. Fraud in fact and fraud in law.
10. The cases considered.
11. Words "hinder, delay, or defraud."
12. Word "disposed" construed.
§ 13. No definition of fraud.
14. Restraints upon alienation.
15. Fraudulent conveyances—Characteristics and classes.
16. Fraudulent conveyances at common law—Statutes declaratory.
17. Covinous transfers of choses in action.
18. Early statutes avoiding fraudulent conveyances.
19. Statute, 13 Eliz. c. 5, and its object.
20. Its interpretation and construction.
21. Statute, 27 Eliz. c. 4.
22. Twyne's Case.

"The rule is universal, whatever fraud creates, justice will destroy."—Vice-Chancellor Van Fleet in *Vreeland* v. *New Jersey Stone Co.*, 29 N. J. Eq. 190.

§ 1. **Severity of the Roman law—Modern changes.**—It has been truly observed that the protection and preservation of the rights of creditors must be a fundamental policy of all enlightened nations.[1] The method by which this pro-

[1] 1 Story's Eq. Jur. § 350; Creditors are "a favored class," Fouche v. Brower, 74 Ga. 251.

tection may be extended and rendered practically effectual is, however, a problem very difficult of solution. The barbarous practice which prevailed among the ancient Romans of putting an insolvent to death, or selling him into slavery, pictures to our imaginations the strong legal and moral foundation which a pecuniary obligation had in the minds of the people in early times. The penalty for the failure to pay a debt was as severe as that which is now ordinarily imposed upon criminals for the commission of the most heinous of crimes.[1]

The chains which held a debtor in the power of his creditor have one by one been broken,[2] but the sacredness of a promise to pay a debt, notwithstanding the abrogation of the ancient penalties, is still voluntarily cherished by the mass of mankind. Yet, unfortunately, the protection and preservation of the rights of creditors is often the last consideration with a numerous class of careless or dishonest

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[1] "After the judicial proof or confession of the debt, thirty days of grace were allowed before a Roman was delivered into the power of his fellow-citizens. In this private prison, twelve ounces of rice were his daily food; he might be bound with a chain of fifteen pounds' weight; and his misery was thrice exposed in the market-place, to solicit the compassion of his friends and countrymen. At the expiration of sixty days, the debt was discharged by the loss of liberty or life; the insolvent debtor was either put to death, or sold in foreign slavery beyond the Tiber; but, if several creditors were alike obstinate and unrelenting, they might legally dismember his body, and satiate their revenge by this horrid partition. The advocates for this savage law have insisted, that it must strongly operate in deterring idleness and fraud from contracting debts which they were unable to discharge." Gibbon's History of the Decline and Fall of the Roman Empire, vol. iv., pp. 372–373. It seems incredible that the following extract could ever have found its way into an English report: "If a man be taken in execution, and lie in prison for debt, neither the plaintiff at whose suit he is arrested, nor the sheriff who took him, is bound to find him meat, drink, or clothes; but he must live on his own, or on the charity of others: and if no man will relieve him, let him die in the name of God, says the law; and so say I." Hyde, Justice, in Manby v. Scott, 1 Mod. 132 (A.D. 1663).

[2] "The tendency of legislation for the last century has almost uniformly been in favor of the poor but honest debtor, and the object of nearly every law upon the subject has been to discourage and discountenance, or entirely prevent, the efforts of unfeeling creditors to oppress and punish him for his poverty." Stevens v. Merrill, 41 N. H. 315.

insolvents. Satisfied of utter inability to pay maturing debts, their remaining property is frequently diverted to inequitable purposes or squandered with reckless profusion. The confiding creditor, when driven to the necessity of seeking a discovery of equitable assets, often finds at the end of the litigation nothing but a mass of worthless securities or "a beggarly account of empty boxes."[1] The underlying reasons for this deplorable condition of affairs will be briefly considered.

§ 2. Prevalence of fraudulent transfers—The cause.—Since the general abolition of imprisonment for contract debts, dishonest people have grown bolder and more reckless, and the power of creditors to enforce payment of just obligations has been correspondingly diminished. This humane reform in our law, which was inspired by the desire to relieve honest but unfortunate debtors from the painful consequences formerly incident to insolvency, is now eagerly availed of by unscrupulous people who contract obligations with little expectation and no probability of fulfilling them. Abolition of imprisonment for debt removed the chief barrier and preventive of fraudulent conveyances, viz.: the terror of the debtor's prison. The personal liberty of the debtor being no longer at stake, the natural tendency has been to promote reckless and extravagant expenditures, and to encourage and foster wild business speculations.

The cost of every reform must be borne by some person or class of persons, and creditors are at the present time paying the great price exacted by this radical change in remedies. The collection of a debt by ordinary process of execution against property on a judgment is now comparatively a rare occurrence. Hence we have in our modern jurisprudence a perplexing problem with which our forefathers were little vexed,—*i. e.*, the question how to neutralize or avoid, in favor of creditors, colorable or cov-

[1] Burtus v. Tisdall, 4 Barb. (N. Y.) 590.

inous transfers of property which this violent change in remedies has rendered it difficult, if not impossible, to prevent or suppress. Collusive voluntary conveyances and secret fraudulent trusts and reservations of a thousand dyes, calculated to hinder and defraud creditors, are the constant and daily subject of investigation in our courts. The temptation of debtors who have not the skill to acquire property honestly, or who have been overwhelmed by some unavoidable disaster, to enrich themselves at the expense of their creditors, by some transaction "wearing a deep complexion of fraud," seems to be irresistible. This is especially the case in a country such as ours, where the comforts and delights which accumulated property brings are so accessible and well guarded, and in which the acquisition of wealth may be regarded as a profound passion. It may be possible to pity the infirmity of the human mind, sinking under an approaching pressure of distress, and resorting to fraudulent means of protection and provision for a family, but the law cannot approve or sanction such transactions.[1] Probably the most severe trial to which an honest man can be subjected is the inability to pay his debts, even by the application of all his means. He is assailed by temptations of interest, of pride, of shame, of affection, to wander from the straight line of duty and integrity, while at the same time he is intrusted by the law with dominion over property which equitably and justly should be devoted to his creditors.[2]

The quantity of litigation engendered by fraudulent conveyances is appalling, and the cunning devices and intricate schemes resorted to by debtors to elude the vigilance of creditors would, if no moral turpitude was involved, challenge admiration. The condition of the body of our law upon this subject is far from satisfactory, and may be said to still be in a formative and unsettled state.

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[1] See Croft v. Townsend, 3 Desaus. (S. C.) 229.

[2] Hafner v. Irwin, 1 Ired. (N. C.) Law, 499.

§ 3. **Scope of the inquiry.**—It will be the purpose of the first portion of this treatise to elucidate the principles of law affecting conveyances made in fraud of creditors, both in this country and in England, and to point out, somewhat at length, the practical methods by which such collusive trusts can be successfully unraveled, the property regained for creditors, and the prevalent modern tendency of debtors to hinder, delay, and defraud their creditors correspondingly repressed. Bills filed to reach equitable assets, not subject to execution, will necessarily receive incidental consideration.

The power of a creditor to inflict anything in the nature of a punishment upon his debtor being practically abrogated in civil procedure,[1] his right to a thorough and searching investigation as to transfers of the debtor's property, in the disposition of which the creditor may justly claim to have an equitable interest,[2] at least to the extent of his demand, should manifestly be facilitated. Such, we are happy to notice, is the general modern tendency of the law, and one of the aims of this treatise will be to show the need of a still further enlargement of these facilities. The practical details of procedure in this class of litigation will receive particular attention. The rights of *bona fide* purchasers and grantees of debtors for valuable consideration will necessarily be embraced in the discussion.

§ 4. **Forms of relief.**—It may be observed that the general purpose of creditors' actions is two-fold; first, to reach assets, such as choses in action, which by their intrinsic nature cannot be taken on execution at law; and second, to recover property, whether tangible or intangible, which

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[1] It is not the function of a court of equity to consider fraud in the light of a crime, nor to punish the guilty party by imposing exemplary costs. See Waltham v. Broughton, 2 Atk. 43. Nor to exercise any censorial authority. See Waters v. Taylor, 2 Ves. & B. 299. Chancery jurisdiction in cases of fraud may be invoked in a civil but not in a criminal point of view.

[2] See Egery v. Johnson, 70 Me. 261. See § 14.

has been fraudulently alienated by the debtor.[1] In the one case the creditor comes into court "to obtain satisfaction of his debt out of the property of the defendant, which cannot be reached by execution at law"; in the other case he proceeds "for the purpose of removing some obstructions fraudulently or inequitably interposed to prevent a sale on execution."[2] It is believed that as to the first class of cases the jurisdiction of equity in favor of creditors was created to supplement the imperfect relief given by execution.

§ 5. **Onus as to fraud—Suspicions insufficient—Absence of presumptions.**—The great obstacles to the effective development of the branch of our law under consideration are the natural tendency of the courts not to presume fraud[3] in the absence of substantial proof of it, and the extreme difficulty attendant upon showing that a transaction, fair and perfect on its face, and having every semblance of validity, the guilty participants in which are often the chief witnesses

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[1] See Chapter III.

[2] Cornell v. Radway, 22 Wis. 264; Beck v. Burdett, 1 Paige (N. Y.) 305. In Jones v. Green, 1 Wall. 331, Field, J., said: "A court of equity exercises its jurisdiction in favor of a judgment-creditor only when the remedy afforded him at law is ineffectual to reach the property of the debtor, or the enforcement of the legal remedy is obstructed by some incumbrance upon the debtor's property, or some fraudulent transfer of it."

[3] See Crawford v. Kirksey, 50 Ala. 591; Kempner v. Churchill, 8 Wall. 369; Erb v. Cole, 31 Ark. 556; Pusey v. Gardner, 21 W. Va. 469; Toney v. McGehee, 38 Ark. 427; Matthai v. Heather, 57 Md. 484; White v. Perry, 14 W. Va. 86; Hord's Adm'r v. Colbert, 28 Gratt. (Va.) 49; Williamson v. Williams, 11 Lea (Tenn.) 356; Tognini v. Kyle, 15 Nev. 464; Hempstead v. Johnston, 18 Ark. 123; Thornton v. Hook, 36 Cal. 223; Foster v. Brown, 65 Ind. 234; Parkhurst v. McGraw, 24 Miss. 134; Henckley v. Hendrickson, 5 McLean 170; Bartlett v. Blake, 37 Me. 124; Waddingham v. Loker, 44 Mo. 132; Kellogg v. Slawson, 15 Barb. (N. Y.) 58; Brigham v. Tillinghast, 15 Barb. (N. Y.) 618; *Ex parte* Conway, 4 Ark. 356; Burgert v. Borchert, 59 Mo. 80; Herring v. Wickham, 29 Gratt. (Va.) 628; Semmens v. Walters, 55 Wis. 684; James v. Van Duyn, 45 Wis. 512; Fuller v. Brewster, 53 Md. 359; Grover v. Wakeman, 11 Wend. (N. Y.) 192; Troxall v. Applegarth, 24 Md. 163; Anderson v. Roberts, 18 Johns. (N. Y.) 515; Cunningham v. Dwyer, 23 Md. 219; Juzan v. Toulmin, 9 Ala. 662; Nichols v. Patten, 18 Me. 231; Cowee v. Cornell, 75 N. Y. 99; Killian v. Clark, 3 MacAr. (D. C.) 379, affi'd as Clark v. Killian, 103 U. S. 766; Jones v. Simpson, 116 U. S. 615.

in subsequent judicial inquiries, is in fact vicious and colorable. Then there exists in some quarters an unconscious sympathy with or for debtors whose fraudulent acts and transactions bear the imprints of intellectual acuteness. The clever or brilliant scoundrel too often escapes with his ill-gotten gains in the maze of admiration excited by his audacity. Fraud, it is also argued, will not be lightly imputed,[1] and cannot be established by circumstances of mere suspicion.[2] Irregularities and carelessness sufficient to arouse a suspicion do not supply the place of proof of fraud.[3] It will not be presumed where an instrument admits of an opposite construction.[4] The common law, it is said, is tender of presuming fraud from circumstances, and expects that it be manifest or plainly inferable.[5] Courts will attribute errors to mistake rather than to fraud,[6] and will not base conclusions of fraud upon mistaken expressions of opinion.[7] A dishonest purpose should not be presumed.[8] Again, it is vaguely asserted that fraud is a fact which must be proved. Courts will not strive to force conclusions of fraud.[9] There must be something more than mere speculative inference.[10] And if the party charging fraud does no more than create an equilibrium he fails to make out his case.[11] As we shall presently see, it is not enough to create a suspicion of wrong.[12] The creditor must prove tangible

[1] Jones v. Simpson, 116 U. S. 615.

[2] Erb v. Cole, 31 Ark. 556; Pratt v. Pratt, 96 Ill. 184; Myers v. Sheriff, 21 La. Ann. 172; White v. Perry, 14 W. Va. 86; Bryant v. Simoneau, 51 Ill. 327; Buck v. Sherman, 2 Doug. (Mich.) 176; Jewett v. Bowman, 29 N. J. Eq. 174; Batchelder v. White, 80 Va. 103; Daniel v. Vaccaro, 41 Ark. 325.

[3] Jewett v. Bowman, 29 N. J. Eq. 174.

[4] Bank of Silver Creek v. Talcott, 22 Barb. (N. Y.) 560.

[5] Roberts on Fraud. Conv., p. 12.

[6] Ayres v. Scribner, 17 Wend. (N. Y.) 407; Goode v. Hawkins, 2 Dev. Eq. (N. C.) 393.

[7] See Hubbell v. Meigs, 50 N. Y. 480; Wakeman v. Dalley, 51 N. Y. 27.

[8] Raymond v. Morrison, 59 Iowa 374; Hager v. Thomson, 1 Black 80; Grant v. Ward, 64 Me. 239; Jones v. Simpson, 116 U. S. 615; Brown v. Dean, 52 Mich. 267; Wood v. Clark, 121 Ill. 359.

[9] Crawford v. Kirksey, 50 Ala. 591.

[10] Battles v. Laudenslager, 84 Pa. St. 451; *Ex parte* Conway, 4 Ark. 356; Toney v. McGehee, 38 Ark. 427; Goodman v. Simonds, 20 How. 360.

[11] Kaine v. Weigley, 22 Pa. St. 179.

[12] Crow v. Andrews, 24 Mo. App. 159.

facts from which a legitimate inference of a fraudulent intent can be drawn.[1] The evidence must convince the understanding that the transaction was entered into for a purpose prohibited by law.[2] Hence "a court will not presume fraud and undue influence merely from the fact that the conveyance is made by a sister to a brother";[3] nor from circumstances which merely indicate unusual generosity.[4] Finch, J., in delivering the opinion of the New York Court of Appeals, said: "Fraud is to be proved and not presumed.[5] It is seldom, however, that it can be directly proved, and usually is a deduction from other facts which naturally and logically indicate its existence. Such facts, nevertheless, must be of a character to warrant the inference. It is not enough that they are ambiguous, and just as consistent with innocence as with guilt. They must not be, when taken together and aggregated, when interlinked and put in proper relation to each other, consistent with an honest intent. If they are, the proof of fraud is wanting."[6] Daniels, J., said, in Marsh v. Falker:[7] "In all actions for deceit the presumption is in favor of innocence; and on that account the intent or design to deceive the plaintiff must be affirmatively made out by evidence."[8]

§ 6. — The badges and evidences of fraud will be discussed presently.[9] We may here observe that mere inadequacy of consideration, unless extremely gross, does not

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[1] Jaeger v. Kelley, 52 N. Y. 276; White v. Perry, 14 W. Va. 86; Hord's Adm'r v. Colbert, 28 Gratt. (Va.) 49; Herring v. Wickham, 29 Gratt. (Va.) 628. Circumstances amounting to mere suspicion of fraud are not to be deemed notice of it. Simms v. Morse, 4 Hughes 582. See Grant v. National Bank, 97 U. S. 80.

[2] Pratt v. Pratt, 96 Ill. 184.

[3] Spicer v. Spicer, 22 J. & S. (N. Y.) 281.

[4] First National Bank v. Irons, 28 N. J. Eq. 43.

[5] Citing Grover v. Wakeman, 11 Wend. (N. Y.) 188.

[6] Shultz v. Hoagland, 85 N. Y. 467. See Ames v. Gilmore, 59 Mo. 537.

[7] 40 N. Y. 566.

[8] See Fleming v. Slocum, 18 Johns. (N. Y.) 403; Jackson v. King, 4 Cowen (N. Y.) 220; Starr v. Peck, 1 Hill (N. Y.) 270.

[9] See Chap. XVI.

per se prove fraud.[1] The disparity as to consideration must be so glaring as to satisfy the court that the conveyance was not made in good faith.[2] Neither can fraud be presumed unless the circumstances on which such presumption is founded are so strong and pregnant that no other reasonable conclusion can be drawn from them,[3] and it seems that even strong presumptive circumstances of fraud will not always outweigh positive testimony against it;[4] nor will fraud be inferred from an act which does not necessarily import it.[5] If an honest motive can be imputed equally as well as a corrupt one, the former should be preferred.[6]

Good faith in business transactions is a settled presumption of law,[7] and the burden of proof is on the party who assails good faith and legality.[8] Many an important case has been wrecked at the trial, or abandoned by the creditor, on account of the great embarrassments which this formidable *onus* imposed. This presumption is the creditor's stumbling-block on the one hand and the shield of unscrupulous debtors on the other. The creditor is constantly forced to carry the war into the enemy's country, and to take by storm the fortifications which the fraudulent debtor or his allies have carefully constructed to impede or repel the attack. It is said in Nicol v. Crittenden,[9] that it is

[1] Kempner v. Churchill, 8 Wall. 369; Smith v. Henkel, 81 Va. 529.

[2] Fuller v. Brewster, 53 Md. 361. Compare Feigley v. Feigley, 7 Md. 537; Copis v. Middleton, 2 Madd. 410; Ratcliff v. Trimble, 12 B. Mon. (Ky.) 32.

[3] Paxton v. Boyce, 1 Tex. 317. See Clemens v. Brillhart, 17 Neb. 337.

[4] The Short Staple, 1 Gall. 104.

[5] Toney v. McGehee, 38 Ark. 427.

[6] Herring v. Richards, 1 McCrary 574.

[7] Hager v. Thomson, 1 Black 80; Cooper v. Galbraith, 3 Wash. 546; Blaisdell v. Cowell, 14 Me. 370; Gutzweiler v. Lackmann, 39 Mo. 91; Roberts v. Guernsey, 3 Grant (Pa.) 237; Reeves v. Dougherty, 7 Yerg. (Tenn.) 222; Richards v. Kountze, 4 Neb. 200; Best on the Right to Begin and Reply, p. 57; Williams v. Lord, 75 Va. 390; Wakeman v. Dalley, 51 N. Y. 31; Marsh v. Falker, 40 N. Y. 566; Starr v. Peck, 1 Hill (N. Y.) 270; Beatty v. Fishel, 100 Mass. 448.

[8] Gutzweiler v. Lackmann, 39 Mo. 91; Silvers v. Hedges, 3 Dana (Ky.) 439; Wilson v. Lazier, 11 Gratt. (Va.) 477.

[9] 55 Ga. 497.

impossible for a transfer to be in fraud of creditors unless it is made with a fraudulent intent, and that the nature of the intent will not be presumed as matter of law, but is to be inferred by the jury from the facts in evidence. This broad statement of the principle is at least debatable and will be considered presently.[1] Then in Cummins v. Hurlbutt,[2] it was asserted that to set aside a written instrument on the ground of fraud, the evidence of the fraud must be clear, precise, and indisputable. A jury should not be permitted to find fraud to impeach a settlement in writing on any fancied equity, or on vague, slight, or uncertain evidence, even though they might think it fairly and fully satisfied them. As a general rule the transaction which is the subject of attack has been evidenced in writing, and the cases show that a deliberate deed or writing, or a judgment of a court, is of too much solemnity to be brushed away by loose and inconclusive evidence.[3]

Fraud, on the other hand, is rarely perpetrated openly and in broad daylight. It is committed in secret and privately, and is usually shrouded in mystery and hedged in and surrounded by all the guards which can be invoked to prevent discovery and exposure. Its operations are invariably circuitous and difficult of detection.[4] The proof of it is very seldom positive and direct,[5] but, as we shall presently see, is dependent upon very many little circumstances and conclusions to be drawn from the general aspects of the case.[6]

§ 7. **Judge Black's views.** — The learned Chief-Justice

[1] See Coleman v. Burr, 93 N. Y. 31, and cases cited. See §§ 9, 10.

[2] 92 Pa. St. 165.

[3] See Howland v. Blake, 97 U. S. 624; Fick v. Mulholland, 48 Wis. 413; Kent v. Lasley, 24 Wis. 654; Harter v. Christoph, 32 Wis. 246; McClellan v. Sanford, 26 Wis. 595.

[4] Kaine v. Weigley, 22 Pa. St. 182.

[5] Strauss v. Kranert, 56 Ill. 254; Rea v. Missouri, 17 Wall. 532; Densmore v. Tomer, 11 Neb. 118; Lockhard v. Beckley, 10 W. Va. 87; Farmer v. Calvert, 44 Ind. 209.

[6] Newman v. Cordell, 43 Barb. (N. Y.) 448–461. See *infra*, Chapter XVI. on Indicia or Badges of Fraud.

Black urged that the proposition that fraud could never be presumed, but must be proved, could be admitted only in a qualified and very limited sense. The idea that it was a fundamental maxim of the law, incapable of modification, and open to no exception, was denied, and the principle was said to have scarcely extent enough to give it the dignity of a general rule. This vigorous writer observes: "It amounts but to this: that a contract, honest and lawful on its face, must be treated as such until it is shown to be otherwise by evidence of some kind, either positive or circumstantial. It is not true that fraud can *never* be presumed. Presumptions are of two kinds, *legal* and *natural*. Allegations of fraud are sometimes supported by one and sometimes by the other, and are seldom, almost never, sustained by that direct and plenary proof which excludes all presumption. A sale of chattels without delivery, or a conveyance of land without consideration, is conclusively presumed to be fraudulent as against creditors, not only without proof of any dishonest intent, but in opposition to the most convincing evidence that the motives and objects of the parties were fair. This is an example of fraud established by mere presumption of law. A natural presumption is the deduction of one fact from another. For instance: a person deeply indebted, and on the eve of bankruptcy, makes over his property to a near relative, who is known not to have the means of paying for it. From these facts a jury may infer the fact of a fraudulent intent to hinder and delay creditors. A presumption of fraud is thus created, which the party who denies it must repel by clear evidence, or else stand convicted. When creditors are about to be cheated, it is very uncommon for the perpetrators to proclaim their purpose, and call in witnesses to see it done. A resort to presumptive evidence, therefore, becomes absolutely necessary to protect the rights of honest men from this, as from other invasions."[1] The statement that "fraud

[1] Kaine v. Weigley, 22 Pa. St. 183.

will not be presumed" must be accepted understandingly, for it certainly *can* be inferred from facts and circumstances,[1] and it is considered to be error to charge a jury that they cannot predicate fraud upon inference or implication,[2] or that the proof must be "irresistible,"[3] or "clear and undoubted,"[4] or that it must be established beyond a reasonable doubt,[5] for evidence that satisfies the mind will support a conclusion of fraud although it may not lead to a conviction of absolute certainty.[6]

§ 8. **Proof of moral turpitude.**—The authorities have been multiplying, in certain quarters at least, to strengthen the efforts of creditors to overcome this difficulty arising from the presumption of validity and good faith. Many of the cases attach but little importance to the sworn assertion of perfect good faith and entire honesty on the part of the purchaser,[7] or of the seller, and the courts are trying to unravel these transfers without exacting explicit proof of moral turpitude.[8] The intent or intention is regarded as

[1] Lowry v. Beckner, 5 B.Mon. (Ky.) 43.

[2] Bullock v. Narrott, 49 Ill. 62; O'Donnell v. Segar, 25 Mich. 367; Reed v. Noxon, 48 Ill. 323.

[3] Carter v. Gunnels, 67 Ill. 270.

[4] Abbey v. Dewey, 25 Pa. St. 413.

[5] Kane v. Hibernia Ins. Co., 39 N. J. L. 697; Lee v. Pearce, 68 N. C. 76; Sparks v. Dawson, 47 Tex. 138; Washington Union Ins. Co. v. Wilson, 7 Wis. 169; Ætna Insurance Co. v. Johnson, 11 Bush (Ky.) 587.

[6] Marksbury v. Taylor, 10 Bush (Ky.) 519; O'Donnell v. Segar, 25 Mich. 367; Lee v. Pearce, 68 N. C. 76; Linn v. Wright, 18 Texas 317; Lockhard v. Beckley, 10 W. Va. 87; Young v. Edwards, 72 Pa. St. 257; Bryant v. Simoneau, 51 Ill. 324.

[7] See Hadden v. Spader, 20 Johns. (N. Y.) 572, 573; Hendricks v. Robinson, 2 Johns. Ch. (N. Y.) 300; Fellows v. Fellows, 4 Cow. (N. Y.) 709; Barrow v. Bailey, 5 Fla. 20; Walter v. Lane, 1 MacAr. (D. C.) 275.

[8] Mr. May says: "The statute is directed not only against such transfers of property as are made with the express intention of defrauding creditors, but . . . . extends as well to such as virtually and indirectly operate the same mischief, by abusing their confidence, misleading their judgment, or secretly undermining their interests; to obviate which it has gradually grown into a practice to regard certain acts or circumstances as indicative of a so-called fraudulent intention in the construction of the statutes, although perhaps there was, in fact, no actual fraud or moral turpitude. It is difficult in many cases of this sort to separate the ingredients which belong to positive and intentional fraud from those of a mere constructive nature, which the law thus pronounces fraudulent upon

an emotion of the mind, shown by acts and declarations, and, as acts speak louder than words, if a party is guilty of an act which defrauds another, his declaration that he did not by the act intend to defraud, is weighed down by the evidence of his own act.[1] A person would not be likely to accomplish an act and afterward say that it was prompted by corrupt motives. The moral sense is much weaker in some men than in others, and it would be a strange rule which made one man's rights dependent upon another's moral sense. There are certain rules founded in experience and established by law for determining the validity of transfers under the statutes concerning fraudulent conveyances; and a transgression of these rules will justify courts and juries in avoiding the transaction without regard to the opinions of the parties to it, and their evidence should have little weight.[2]

In French v. French,[3] Lord Chancellor Cranworth remarked: "I shall not say that the transfer was voluntary or *fraudulent*, but simply void as against the creditors of William French." Again he observed in Spackman v. Evans:[4] "I do not attribute moral fraud to the appellant, but the whole transaction was fictitious." So in Backhouse v. Jett,[5] Chief-Justice Marshall said: "The policy of the law very properly declares this gift void as to creditors, but looking at the probable views of the parties at the time, there appears to be no moral turpitude in it."[6] This principle may be further illustrated from Gardiner Bank v. Wheaton,[7] where the court say: "When we pronounce the transaction between the defendants, in respect to the conveyance from Gleason to Cole, as fraudulent, we do not

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principles of public policy." May on Fraudulent Conveyances, p. 4.

[1] Babcock v. Eckler, 24 N. Y. 623; Newman v. Cordell, 43 Barb. (N. Y.) 456. See *infra*, chapter on Intention.

[2] Potter v. McDowell, 31 Mo. 73.

[3] 6 De G., M. & G. 103.

[4] L. R. 3 Eng. & Ir. App. 189.

[5] 1 Brock. 511.

[6] See Logan v. Brick, 2 Del. Ch. 206.

[7] 8 Me. 381. See Wheelden v. Wilson, 44 Me. 11.

mean to insinuate that there was any moral turpitude on the part of Prince; nor do we believe there was any; but though the motives of a party may be good in such a transaction, still, where the design, if sanctioned, would defeat or delay creditors . . . . neither law nor equity can sanction the proceeding; and on that account it is termed a legal fraud, or a fraud upon the law."[1] "It was not necessary," said Dwight, C., in Cole v. Tyler,[2] "that there should be any actual fraudulent intent.[3] The requisite intent may be inferred from the circumstances of the case."[4] The act may be adjudged covinous although the parties deny all intention of committing a fraud,[5] and it is not necessary to impute to the parties "a premeditated or wicked intention to destroy or injure" the interests of others.[6] A man may commit a fraud without believing it to be a fraud.[7] The statute, 13 Eliz., refers to a legal, and not a moral intent; that is, not a moral intent as contradistinguished from a legal intent. It supposes that every one is capable of perceiving what is wrong, and, therefore, if he does that which is forbidden, intending to do it, he will not be allowed to say that he did not intend to do a prohibited act. A man's moral perceptions may be so perverted as to imagine an act to be fair and honest which the law justly pronounces fraudulent and corrupt.[8] "It is not important what *motives* may have animated the parties," if the necessary effect of the disposition is to hinder and delay creditors.[9] It results that the mental operation or emotion of the debtor, and the legal conclusion from the acts and circumstances may be diametrically opposed.

[1] See Jenkins v. Lockard, 66 Ala. 381; Bibb v. Freeman, 59 Ala. 612.

[2] 65 N. Y. 77.

[3] Citing Mohawk Bank v. Atwater, 2 Paige (N. Y.) 54.

[4] Compare Watson v. Riskamire, 45 Iowa 233; Coleman v. Burr, 93 N. Y. 31; Graham v. Chapman, 12 C. B. 85.

[5] Kirby v. Ingersoll, 1 Harr. Ch. (Mich.) 191.

[6] Kirby v. Ingersoll, 1 Doug. (Mich.) 477, 493.

[7] Emma Silver Mining Co. v. Grant, L. R. 17 Ch. D. 122.

[8] Grover v. Wakeman, 11 Wend. (N. Y.) 225.

[9] Moore v. Wood, 100 Ill. 451.

§ 9. **Fraud in fact and fraud in law.**—Some of the cases maintain that there is not, for any practical purpose, so far as the validity of the particular transaction may be concerned, any difference between fraud in fact and fraud in law;[1] between a fraud proved by direct evidence, and a fraud inferred by law from facts which are consistent with the absence of an actual intent to defraud. Whenever the effect of a particular transaction with a debtor is to hinder, delay, or defraud creditors, the law infers the intent, though there may be no direct evidence of a corrupt or dishonorable motive, but on the contrary, an actual honest motive existed. The law interposes, and declares that every man is presumed to intend the natural and necessary consequences of his acts; and the courts must presume the intention to exist, when the prohibited consequences must necessarily follow from the act, and will not listen to an argument against it.[2] Hence it has been remarked that where a conveyance *by its terms* operates to hinder, delay, or defraud creditors, the intent to do so is imputed to the parties, and *no evidence of intention* can change that presumption. A different intent cannot be shown and made out by the reception of parol testimony, nor deduced from surrounding circumstances.[3] What is meant by these cases is that whether the fraudulent intent is reasoned out and declared by the court by the proper application of the rules

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[1] See § 51.

[2] Sims v. Gaines, 64 Ala. 396; Pope v. Wilson, 7 Ala. 694; Wiley v. Knight, 27 Ala. 336; Potter v. McDowell, 31 Mo. 69. See Bentz v. Rockey, 69 Pa. St. 77; Harman v. Hoskins, 56 Miss. 142; Allan v. McTavish, 8 Ont. App. Rep. 440, and cases cited; Coleman v. Burr, 93 N. Y. 31, and cases cited. Compare State v. Estel, 6 Mo. App. 6. In Wilt v. Franklin, 1 Binn. (Pa.) 517, the court observed: "Although the statute, 13 Eliz., is bottomed on the supposition of an immoral intention, yet it has been judged necessary to determine, that certain circumstances, which, in their nature, tend to deceive and injure creditors, shall be considered as sufficient evidence of fraud."

[3] Farrow v. Hayes, 51 Md. 505; Green v. Trieber, 3 Md. 11. See Sangston v. Gaither, 3 Md. 40; Malcolm v. Hodges, 8 Md. 418; Inloes v. Amer. Ex. Bank, 11 Md. 173; Barnitz v. Rice, 14 Md. 24; Whedbee v. Stewart, 40 Md. 414.

of legal construction and interpretation to the particular transaction or instrument under consideration, or whether it is found by a jury to exist as matter of fact,[1] in either case the transfer is made with the intent to defraud creditors, and may be avoided. Hence it is said that where the fraudulent intent is not apparent on the face of the deed, it is a question of fact for the jury,[2] and the court has not the power to infer the intent.[3]

§ 10. **The cases considered.**—This subject may perhaps be illustrated from the case of Harman v. Hoskins,[4] where it is laid down that the intent may be vicious, though the deed is fair and regular upon its face, and a full price was paid. The intent must then be proved *aliunde*. In cases where the transaction *on its face* is fair, if it sprung from the motive to "hinder, delay, or defraud" creditors, then the intent is purely a question of fact to be established by the testimony. But a party will be held as intending the natural and inevitable legal effects of his acts. Hence if his deed by its recitals necessarily operates to interpose unreasonable hindrance and delay to creditors, or to entirely defeat their claims, the question of intent will be practically a conclusion of law. A deliberate act which naturally and inevitably produces a certain result, must in law be held to have been contrived and performed to carry out and consummate that result. The court in such a case arrives at the conclusion, by a proper construction of the instrument, that such is its direct and inevitable effect, and its result, as matter of law, that the statute is satisfied. In other words, the transaction itself so palpably and conclusively establishes the intent that testimony upon that point would

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[1] Nicol v. Crittenden, 55 Ga. 497; Williams v. Evans, 6 Neb. 216.

[2] Van Bibber v. Mathis, 52 Tex. 409. See Briscoe v. Bronaugh, 1 Tex. 327; Bryant v. Kelton, 1 Tex. 415; Peiser v. Peticolas, 50 Tex. 638.

[3] Ehrisman v. Roberts, 68 Pa. St. 308; Kelly v. Lenihan, 56 Ind. 450; Tognini v. Kyle, 15 Nev. 468; Monteith v. Bax, 4 Neb. 166.

[4] 56 Miss. 142.

be superfluous, and a finding of a jury of an intent different from that which the legitimate construction of the instrument furnishes, would be erroneous.[1] Thus in Young v. Heermans,[2] a conveyance by a debtor of all his property, real and personal, without consideration, and in trust for the grantor's benefit during his life, and after his death for the payment of his debts, was declared to be fraudulent *per se;* no evidence *aliunde* being deemed necessary to establish the fraudulent intent. Proof of the intention to enter into the prohibited transaction is all that is requisite. When the courts declare an instrument fraudulent on its face, it does not necessarily mean that it was the offspring of a corrupt intent considered as a mental operation, but that "it is an instrument the law will not sanction or give effect to, as to third persons, on account of its susceptibility of abuse, and the great danger of such contracts being used for dishonest purposes." [3]

It may scarcely be proper to say in these cases that there is a presumption or conclusion of law that the transaction is fraudulent, but rather that the circumstances of the transaction, *or the transaction itself*, furnish conclusive evidence of fraud; and if, against such evidence, a jury, a judge, or referee should find that there was no fraud, a new trial would be granted, not because any legal presumption or conclusion had been violated, but because the finding was against the weight of evidence; against conclusive evidence.[4] The intent is gathered from the instrument, and no external aid is necessary to develop it.[5] The fraud is self-evident.[6] But to find fraud as matter of law it must so expressly and plainly appear in the instrument as to be incapable of explanation by evidence *dehors*.[7]

[1] See Dunham v. Waterman, 17 N. Y. 21.

[2] 66 N. Y. 374.

[3] Gay v. Bidwell, 7 Mich. 531, dissenting opinion of Manning, J.

[4] Babcock v. Eckler, 24 N. Y. 632.

[5] Harman v. Hoskins, 56 Miss. 145.

[6] Hardy v. Simpson, 13 Ired. (N. C.) Law, 132, 139; Bigelow on Fraud, p. 468.

[7] Cheatham v. Hawkins, 76 N. C. 335.

Grover, J., an able judicial officer, and vigorous writer, ignored the distinction between fraud in law and fraud in fact, in these words: "A distinction is attempted, in some of the cases, between fraud in law and fraud in fact. I think there is no solid foundation for it. When upon the face of the assignment any illegal provision is found, the presumption at once conclusively arises that such illegal object furnished one of the motives for making the assignment; and it is upon this ground adjudged fraudulent and void. The result is the same when the illegal design is established by other evidence. The inquiry is as to the intention of the assignor."[1] Coleman v. Burr[2] is an extreme illustration. The referee found that the conveyance was honest, but the transaction was set aside because from the facts found the inference of fraud was inevitable.

"Fraud," said Mr. Justice Buller, in Estwick v. Caillaud,[3] "is sometimes a question of law, sometimes a question of fact, and sometimes a mixed question of law and of fact." Perhaps it would be more accurate to say that fraud is never purely a question of law, nor exclusively a question of fact,[4] though it frequently partakes more largely of the one quality than of the other. Fraud is not to be considered as turning solely on intent as an emotion, but as a legal deduction. "What intent," said Ruffin, J., "is in law fraudulent, the court must inform the jury, else the law can have no rule upon the doctrine of fraud; and every case must create its own law."[5] Perhaps the clearest division of fraud is into three classes; first, fraud that is self-evident, with which the jury have nothing to do; second, fraud which depends upon a variety of circumstances usually connected with motive

[1] Oliver Lee & Co.'s Bank v. Talcott, 19 N. Y. 148. See, in this connection, Lukins v. Aird, 6 Wall. 79, per Davis, J.; Burr v. Clement, 9 Col. 1; Stevens v. Robinson, 72 Me. 381; French v. Holmes, 67 Me. 189; Cunningham v. Freeborn, 11 Wend. (N. Y.) 252.

[2] 93 N. Y. 31.

[3] 5 T. R. 420.

[4] Foster v. Woodfin, 11 Ired. (N. C.) Law, 339.

[5] Leadman v. Harris, 3 Dev. (N. C.) Law, 146.

and intent, which is an open question of fact for the jury, with instructions as to what constitutes fraud; third, presumptive fraud where the presumption may be rebutted.[1]

§ 11. **Words "hinder, delay, or defraud."**—To hinder and delay creditors is to do something which is an attempt to defraud, rather than the successful accomplishment of a fraud; to put some obstacle in the path, or interpose unjustifiably some period of time before the creditor can reach his debtor's property and apply it toward the liquidation of the debt.[2] The words "hinder," "delay,"[3] and "defraud" are not synonymous.[4] A conveyance may be made with intent to hinder or delay without an intent to absolutely defraud. Either intent is sufficient.[5] The statute is in the disjunctive and attempts to attach a separate and specific meaning to each of the words which it employs.[6] An instance of hindrance and delay within the statute is given in

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[1] Hardy v. Simpson, 13 Ired. (N. C.) Law, 139. In Coburn v. Pickering, 3 N. H. 415, Richardson, C. J., lays down the rule that whether there was any trust is a question of fact, but the trust being proved or admitted, the fraud is an inference of law which the court must pronounce. His exact language, after a discussion of the authorities, is as follows: "It thus seems to us, to be settled, as firmly as any legal principle can be settled, that the fraud which renders void the contract, in these cases, is a secret trust, accompanying the sale. . . . . It is, therefore, very clear, that fraud is sometimes a question of fact, and sometimes a question of law. When the question is, was there a secret trust, it is a question of fact. But when the fact of a secret trust is admitted, or in any way established, the fraud is an inference of law, which a court is bound to pronounce." So, upon like principle, it was held in Phelps v. Curts, 80 Ill. 112, not to be important what motives may have animated the parties, if they have so disposed of the property that the necessary effect is to hinder and delay creditors. Such a disposition is, in judgment of law, a legal fraud. To the same effect, also, is Power v. Alston, 93 Ill. 587; Emerson v. Bemis, 69 Ill. 537; Moore v. Wood, 100 Ill. 454.

[2] Burnham v. Brennan, 42 N. Y. Superior Ct. 63.

[3] In Read v. Worthington, 9 Bosw. (N. Y.) 628, Robertson, J., said: "To hinder any one in his course is, necessarily, to delay him. Not being able to perceive the distinction, I must hold that none exists. Many such pleonasms are to be found in old English statutes, where they are introduced for caution's sake, more than with any precise idea as to what they were intended to effect."

[4] Hickox v. Elliott, 22 Fed. Rep. 21.

[5] Crow v. Beardsley, 68 Mo. 439; Rupe v. Alkire, 77 Mo. 641.

[6] Burgert v. Borchert, 59 Mo. 83.

a case in Pennsylvania, where a debtor departed from the State leaving no property subject to the process of his creditor, and making no provision for the payment of his debts.[1] A better illustration is to be found in a case in the New York Court of Appeals, where the debtor conveyed his property in trust for his own benefit during his life, and after his death for the payment of his debts.[2] The authorities avoiding assignments by the terms of which the assignee is empowered to sell upon credit are, perhaps, more in point than either of the illustrations given. A conveyance of real estate by a debtor upon the understanding that the grantee should hold it in trust for the grantor, and as fast as money could be realized therefrom, should apply it to the payment of his debts, necessarily operates to hinder and delay creditors. A debtor's property is in theory of law subject to immediate process issued at the instance of his creditors, and the debtor will not be permitted to hinder or delay them by any device which leaves it, or the avails of it, subject to his control and disposition ; and it makes no difference that the debtor intends to apply the avails of it to the payment of his debts.[3] So a deed of trust creating a lien upon personalty for an indefinite period, the natural operation of which is to benefit the grantor, is fraudulent as to creditors.[4]

The statute seems to be aimed at three things which it is supposed insolvents would possibly be tempted to do for the purpose of avoiding or deferring the payment of their debts. First, they might dispose of their property in such manner as to interpose obstacles to legal process, with intent to hinder creditors in the collection of their demands ; or, second, to delay payment to some future period ; or, third, to defraud their creditors by absolutely defeating all

[1] Heath v. Page, 63 Pa. St. 108.

[2] Young v. Heermans, 66 N. Y. 374. See S. P. Graves v. Blondell, 70 Me. 194; Henry v. Hinman, 25 Minn. 199; Macomber v. Peck, 39 Iowa 351 ; Lukins v. Aird, 6 Wall. 78 ; Donovan v. Dunning, 69 Mo. 436 ; Lore v. Dierkes, 19 J. & S. (N. Y.) 144.

[3] Smith v. Conkwright, 28 Minn. 23.

[4] State v. Mueller, 10 Mo. App. 87.

attempts to enforce their claims. Any one of these purposes is sufficient to avoid the transaction.[1] If the design of a transfer is a lawful one it matters not that a creditor is thereby deprived of property which might otherwise have been reached and applied to the payment of his debt. Hence it is that a general assignment,[2] or a preference,[3] is upheld, though each is often made or given to thwart some belligerent creditor.[4] The secret motives that prompt the act in such cases are unimportant.[5] Speaking of devices to aid the debtor, Davis, J., said, in Robinson v. Elliott:[6] "The creditor must take care in making his contract that it does not contain provisions of no advantage to him, but which benefit the debtor, and were designed to do so, and are injurious to other creditors. The law will not sanction a proceeding of this kind. It will not allow the creditor to make use of his debt for any other purpose than his own indemnity. If he goes beyond this, and puts into the contract stipulations which have the effect to shield the property of his debtor, so that creditors are delayed in the collection of their debts, a court of equity will not lend its aid to enforce the contract." A debtor cannot take the law into his own hands and attempt to secure the delay which can only be obtained by the consent of creditors.[7]

§ 12. **Word "disposed" construed.**—In Bullene v. Smith,[8] it appeared that section 398 of the Revised Statutes of

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[1] Burdick v. Post, 12 Barb. (N. Y.) 172, affi'd 6 N. Y. 522. See Pilling v. Otis, 13 Wis. 495; Burgert v. Borchert, 59 Mo. 80; Crow v. Beardsley, 68 Mo. 435; Planters' Bank v. The Willea Mills, 60 Ga. 168; Sutton v. Hanford, 11 Mich. 513; Davenport v. Cummings, 15 Iowa 219; Means v. Dowd, 128 U. S. 281. See, especially, the case of Nicholson v. Leavitt, 6 N. Y. 510; S. C. 10 N. Y. 591.

[2] Hoffman v. Mackall, 5 Ohio St. 124; Hefner v. Metcalf, 1 Head (Tenn.) 577; Grover v. Wakeman, 11 Wend. (N. Y.) 194.

[3] Hall v. Arnold, 15 Barb. (N. Y.) 599; Hartshorn v. Eames, 31 Me. 98.

[4] Hartshorn v. Eames, 31 Me. 98; Holbird v. Anderson, 5 T. R. 235.

[5] Horwitz v. Ellinger, 31 Md. 504; Pike v. Bacon, 21 Me. 280; Covanhovan v. Hart, 21 Pa. St. 500.

[6] 22 Wall. 523.

[7] Means v. Dowd, 128 U. S. 281.

[8] 73 Mo. 151.

Missouri, authorized an attachment to issue in the following, among other cases: Where the defendant had fraudulently *conveyed* or assigned his property so as to hinder or delay his creditors; where the defendant had fraudulently concealed, removed, or *disposed* of his property or effects, so as to hinder his creditors. The court held that the word *disposed*, as here used, covered all such alienations of property as might be made in ways not otherwise pointed out in the statute: for example, pledges, gifts, pawns, bailments, and other transfers and alienations which might be effected by mere delivery and without the use of any writing, assignment, or conveyance. Other species of conveyances were excluded. Hence it was held that a charge to a jury to the effect that the defendant had fraudulently disposed of his property was not supported by proof that he had executed a fraudulent mortgage.

§ 13. **No definition of fraud.**—Fraud is as difficult to define[1] as it is easy to perceive. Courts of equity have skilfully avoided giving a precise and satisfactory definition of it,[2] so various is its form and color. It is sometimes said to consist of "any kind of artifice employed by one person to deceive another," conduct that operates prejudicially on the rights of others,[3] or withdraws the property of a debtor from the reach of creditors.[4] But the term is one that admits of no positive definition, and cannot be controlled in its application by fixed and rigid rules. Fraud is "so subtle in its nature, and so protean in its disguises, as to render it almost impossible to give a definition which fraud would not find means to evade."[5] It is to be inferred or not, according to the special circumstances of every case. Whenever it occurs it usually vitiates the transaction tainted by

[1] See Green v. Nixon, 23 Beav. 530; Reynell v. Sprye, 1 De G., M. & G. 691.

[2] See Beach on Contributory Neg., § 2. Compare Chesterfield v. Janssen, 1 Atk. 352; Shoemaker v. Cake, 83 Va. 5.

[3] Bunn v. Ahl, 29 Pa. St. 390.

[4] McKibbin v. Martin, 64 Pa. St. 356.

[5] Shoemaker v. Cake, 83 Va. 5.

it.[1] "Fraud cuts down everything." "Fraud," said De Grey, C. J., "is an extrinsic, collateral act, which vitiates the most solemn proceedings of courts of justice. Lord Coke says it avoids all judicial acts, ecclesiastical or temporal."[2] It is the judgment of law on facts and intents.[3] Its existence is often a presumption of law from admitted or established facts, irrespective of motive, and too strong to be rebutted.[4] "Fraud," said Story, J., "will vitiate any, even the most solemn transactions; and an asserted title to property, founded upon it, is utterly void."[5] "Fraud is always a question of fact with reference to the intention of the grantor. Where there is no fraud there is no infirmity in the deed. Every case depends upon its circumstances, and is to be carefully scrutinized. But the vital question is always the good faith of the transaction. There is no other test."[6] Fraud does not consist in mere intention, but in intention carried out by hurtful acts.[7] "Fraud or no

[1] Fenner v. Dickey, 1 Flippin 36.

Undue influence.—So what constitutes undue influence is a question depending upon the circumstances of each particular case. It is a species of constructive fraud which the courts will not undertake to define by any fixed principles, lest the very definition itself furnish a finger-board pointing out the path by which it may be evaded. The following principle, we think, is sound, both in law and morals, and though a departure from the former rule, is sustained by the more modern authorities. When one, living in illicit sexual relations with another, makes a large gift of his property to the latter, especially in cases where the donor excludes the natural objects of his bounty, the transaction will be viewed with such suspicion by a court of equity as to cast on the donee the burden of proving that the donation was the result of free volition, and was not superinduced by fraud or undue influence. See Shipman v. Furniss, 69 Ala. 555, and cases cited; s. c. 44 Am. Rep. 528, and note; Leighton v. Orr, 44 Iowa 679; Dean v. Negley, 41 Pa. St. 312.

[2] Rex v. Duchess of Kingston, 20 How. St. Tr. 544; 2 Smith's L. C. 687. See Brownsword v. Edwards, 2 Ves. Sen. 246; Meddowcroft v. Huguenin, 4 Moo. P. C. 386; Perry v. Meddowcroft, 10 Beav. 122; Harrison v. Mayor, etc. of Southampton, 4 De G., M. & G. 137; Gill v. Carter, 6 J. J. Marsh (Ky.) 484; Hall v. Hall, 1 Gill (Md.) 391; Wilson v. Watts, 9 Md. 356.

[3] Pettibone v. Stevens, 15 Conn. 26; Sturtevant v. Ballard, 9 Johns. (N. Y.) 342; Otley v. Manning, 9 East 64; Morgan v. Elam, 4 Yerg. (Tenn.) 438; Worseley v. Demattos, 1 Burr. 467.

[4] Belford v. Crane, 16 N. J. Eq. 265.

[5] United States v. Amistad, 15 Peters 594.

[6] Per Swayne, J., Lloyd v. Fulton, 91 U. S. 485.

[7] Williams v. Davis, 69 Pa. St. 28

fraud is generally a question of fact to be determined by all the circumstances of the case."[1] Direct proof of positive fraud in the various kinds of covinous alienations which we are to discuss, is not, as we shall presently see, generally attainable, nor is it vitally essential. The fraudulent conspirators will not be prompted to proclaim their unlawful intentions from the housetops, or to summon disinterested parties as witnesses to their nefarious schemes. The transaction, like a crime, is generally consummated under cover of darkness, with the safeguards of secrecy thrown about it. Hence it must be scrutinized and judged by all the surrounding circumstances of the case. The evidence is "almost always circumstantial. Nevertheless, though circumstantial, it produces conviction in the mind often of more force than direct testimony."[2] In such cases, where fraud is in issue, "the field of circumstances ought to be very wide."[3] From the very nature of the case it can rarely ever be proved otherwise than by circumstantial evidence. And if the facts and circumstances surrounding the case, and distinctly proven, are such as would lead a reasonable man to the conclusion that fraud in fact existed, this is all the proof which the law requires.[4] It may be observed that there can be no fraud unless there exist claims and rights which can be delayed and hindered, and which, but for the fraudulent conveyance, could be asserted. The law takes no cognizance of fraudulent practices that injure no one. Fraud without injury will not furnish a cause of action. Unless these elements co-exist, the courts are powerless to render any relief.[5]

§ 14. **Restraints upon alienation.**—A conveyance as regards

[1] Per Hunt, J., Humes v. Scruggs, 94 U. S. 22–28. See McKibbin v. Martin, 64 Pa. St. 356; Knowlton v. Mish, 8 Sawyer 627.

[2] See Kempner v. Churchill, 8 Wall. 369; Newman v. Cordell, 43 Barb. (N. Y.) 456; Babcock v. Eckler, 24 N. Y. 623; Hamett v. Dundass, 4 Pa. St. 181; Warner v. Blakeman, 4 Abb. App. Dec. (N. Y.) 535; Tumlin v. Crawford, 61 Ga. 128; Engraham v. Pate, 51 Ga. 537.

[3] Engraham v. Pate, 51 Ga. 537.

[4] Lockhard v. Beckley, 10 W. Va. 87; White v. Perry, 14 W. Va. 86.

[5] Fellows v. Lewis, 65 Ala. 354;

real property may be defined to be "the transfer of the title of land from one person, or class of persons, to another,"[1] or as "a deed which passes and conveys land from one man to another."[2] The usual incident of property of every kind owned or possessed by persons *sui juris* is the power of alienation; generally speaking, every man may in theory of law do what he pleases with that which is his own.[3] Almost the sole remaining restraint upon the power of alienation of land is that which adjudges void conveyances of real property held adversely by a third party at the date of the conveyance. Statutes adjudging such conveyances void "were originally introduced partly upon the theory that it would be dangerous to permit the transfer of disputed or 'fighting' titles, lest powerful and influential persons might purchase and use such titles as a means of oppressing poor people."[4] But these statutes are being rapidly abolished, circumvented, or ignored as impracticable and unnecessary in this country, and even this restraint upon alienation will soon be wholly superseded.[5] The restriction which we are

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Castle v. Palmer, 6 Allen (Mass.) 401; Legro v. Lord, 10 Me. 161; Foster v. McGregor, 11 Vt. 595; Danforth v. Beattie, 43 Vt. 138; Crummen v. Bennet, 68 N. C. 494; Sears v. Hanks, 14 Ohio St. 298; Vaughan v. Thompson, 17 Ill. 78; Muller v. Inderreiden, 79 Ill. 382; Anthony v. Wade, 1 Bush (Ky.) 110; Morton v. Ragan, 5 Bush (Ky.) 334; Lishy v. Perry, 6 Bush (Ky.) 515; Kuevan v. Specker, 11 Bush (Ky.) 1; Vogler v. Montgomery, 54 Mo. 577; Smith v. Rumsey, 33 Mich. 183; Huguninv. Dewey, 20 Iowa 368; Edmonson v. Meacham, 50 Miss. 34; Wood v. Chambers, 20 Tex. 247; McFarland v. Goodman, 6 Biss. 111; Cox v. Wilder, 2 Dill. 45; Smith v. Kehr, 2 Dill. 50; Dreutzer v. Bell, 11 Wis. 114; Pike v. Miles, 23 Wis. 164; Murphy v. Crouch, 24 Wis. 365; Succession of Cottingham, 29 La. Ann. 669. Compare Getzler v. Saroni, 18 Ill. 511; Currier v. Sutherland, 54 N. H. 475; Huey's Appeal, 29 Pa. St. 219. See §§ 46–48.

[1] Klein v. McNamara, 54 Miss. 105.

[2] Brown v. Fitz, 13 N. H. 285. "There is no magical meaning in the word 'conveyance'; it denotes an instrument which carries from one person to another an interest in land." Lord Cairns, L. C., in Credland v. Potter, L. R. 10 Ch. App. 12.

[3] See § 52.

[4] Sedgwick & Wait on Trial of Title to Land (2d ed.), § 190. See Sedgwick v. Stanton, 14 N. Y. 295; Crary v. Goodman, 22 N. Y. 177; McMahan v. Bowe, 114 Mass. 145; Humbert v. Trinity Church, 24 Wend. (N. Y.) 611; Matter of Department of Parks, 73 N. Y. 560; Dawley v. Brown, 79 N. Y. 390; Williams v. Rawlins, 33 Ga. 117.

[5] Ibid.

about to consider upon a debtor's power of alienation of property at the expense of his creditor, is one that has existed from time immemorial, and which will not outlive its usefulness so long as people are dishonest or inclined to be generous before they are just. The claims of creditors, it may be observed, rest upon legal obligations higher than the demands of affection or generosity, commendable as a response to these may be when no duties which the law declares paramount intervene.[1] Creditors, as we have said, have an equitable interest for the payment of their claims in their debtor's property, or in "the means he has of satisfying their demands,"[2] and there is in our jurisprudence a clear restraint upon the debtor's right of alienation, where it is attempted to be exercised for the purpose of hindering, delaying, or defrauding his creditors, or defeating their lawful right to subject his property by legal process to the satisfaction of their lawful demands. The cardinal principle running through all such cases is, that the property of the debtor shall not be diverted from the payment of his debts, to the injury of his creditors by means of the fraud.[3] The law does not restrain a man's dominion over his own property so long as he acts with fairness and good faith; but it avoids all fraudulent alienations devised to secure property from the pursuit of his creditors; it is fraudulent to defeat them by a reservation of benefit to himself; it is equally fraudulent to defeat them by benefactions conferred upon others.[4]

"The current of law," says Professor Gray,[5] "has for centuries been in favor of the removal of old restraints on alienation; in favor of the disallowance of new ones; and

[1] See Potter v. Gracie, 58 Ala. 303; Wait v. Day, 4 Denio (N. Y.) 439; Sherman v. Barrett, 1 McMull. (S. C.) Law 147.

[2] Seymour v. Wilson, 19 N. Y. 418.

[3] Clements v. Moore, 6 Wall. 312; Tompkins v. Sprout, 55 Cal. 36.

[4] Lockhard v. Beckley, 10 W. Va. 96; Hunters v. Waite, 3 Gratt. (Va.) 26.

[5] Restraints on the Alienation of Property, by John Chipman Gray, Esq., Story Professor of Law in Harvard University. Boston: Soule & Bugbee, 1883, p. 2.

especially in favor of compelling a debtor to apply to his debts all property which he could use for himself or give at his pleasure to others. The legislatures and the courts have co-operated to this end. Family and ecclesiastical pride, natural dishonesty, and narrow precedents have been formidable obstacles to this movement, but its general success has been unmistakable." The debtor must devote all his property absolutely to the payment of his debts; reserve no control for himself;[1] provide for no benefit to himself,[2] other than what may result from the payment of his debts; impose no condition upon the right of the creditors to participate in the fund; authorize no delay on the part of the trustee.[3] A debtor may be said to sustain two distinct relations to his property: that of owner and *quasi* trustee for his creditors. As owner he may contract debts to be satisfied out of his property, create liens upon it, and sell or give it to others at pleasure, and, as we shall presently see, so far as he is personally concerned, he will be bound by his own acts. The law, however, lays upon him an obligation to pay his debts, and in behalf of his creditors holds him to the exercise of good faith in all transactions relating to the fund upon which they necessarily depend for payment. The debtor, therefore, cannot be permitted to create fictitious debts, or to do any of the acts specified *mala fide* to the prejudice of his creditors.

§ 15. **Fraudulent conveyances—Characteristics and classes.**—A fraudulent conveyance may be defined to be a conveyance the object, tendency, or effect of which is to defraud another, or the intent of which is to avoid some duty or debt due by or incumbent upon the party making it.[4] As

[1] West v. Snodgrass, 17 Ala. 554; Riggs v. Murray, 2 Johns. Ch. (N. Y.) 565; Donovan v. Dunning, 69 Mo. 436; Fisher v. Henderson, 8 N. B. R. 175; Means v. Dowd, 128 U. S. 281.

[2] See Lukins v. Aird, 6 Wall. 79; Wooten v. Clark, 23 Miss. 75; Arthur v. Com. & R. Bank, 17 Miss. 394; Towle v. Hoit, 14 N. H. 61.

[3] Oliver Lee & Co.'s Bank v. Talcott, 19 N. Y. 148.

[4] See 2 Kent's Com. 440; 4 Id. 462. "One of the surest tests of a fraudulent conveyance is that it reserves to the

was said by Lord Mansfield in Cadogan v. Kennett:[1] "The question in every case is, whether the act done is a *bona fide* transaction, or whether it is a *trick and contrivance* to defeat creditors." The same test has been referred to as decisive by Mr. Justice Story[2] and Chief-Justice Marshall.[3] As we shall presently see, to constitute such a disposition of property, three elements must concur—first, the thing disposed of must be of value, out of which the creditor could have realized all or a portion of his claim; second, it must be transferred or disposed of by the debtor; and third, this must be done with intent to defraud.[4] Stated in another form: in order to bring a case within the terms of the statute, there must exist a creditor to be defrauded, a debtor intending to defraud, and a conveyance of property which is appropriable by law to the payment of the debt due.[5] Usually, to avoid the transaction there must be some interest in the property left in the debtor;[6] some reservation inconsistent with a true sale; or some hiding or cloaking of the surplus so as to cover it up for the benefit of the debtor or his family.[7] Whether a conveyance be fraudulent or not, as against creditors, depends on whether it was made on good consideration and

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grantor an advantage inconsistent with its avowed purpose, or an unusual indulgence." Thompson v. Furr, 57 Miss. 484. See Bentz v. Rockey, 69 Pa. St. 71; Edwards v. Stinson, 59 Ga. 443; Mitchell v. Stetson, 64 Ga. 442. Such, for instance, as a support. Graves v. Blondell, 70 Me. 194; Henry v. Hinman, 25 Minn. 199; Young v. Heermans, 66 N. Y. 374.

[1] 2 Cowp. 434.

[2] 2 Story's Eq. Jur. § 353.

[3] United States v. Hooe, 3 Cranch 73. "The test as to whether a conveyance is fraudulent or void as to a creditor is, does it hinder him in enforcing his debt? Does it deprive him of a right which would be legally effective if the conveyance or device had not been resorted to?" Wagner v. Smith, 13 B. J. Lea (Tenn.) 569.

[4] Hoyt v. Godfrey, 88 N. Y. 669. See Florence Sewing Machine Co. v. Zeigler, 58 Ala. 224. See § 23.

[5] O'Conner v. Ward, 60 Miss. 1036.

[6] Means v. Dowd, 128 U. S. 281; Young v. Willis, 82 Va. 296; McCormick v. Atkinson, 78 Va. 8; Wray v. Davenport, 79 Va. 19.

[7] See Hobbs v. Davis, 50 Ga. 214; Price v. Pitzer, 44 Md. 527; Todd v. Monell, 19 Hun (N. Y.) 362; Young v. Willis, 82 Va. 296.

bona fide. It is not enough that it be on good consideration *or bona fide;* it must be both. If it be defective in either particular, though good between the parties and their representatives, it is voidable as to creditors.[1] It has been observed that to avoid a fraudulent transfer three things are necessary: Fraud on the part of the vendor; fraud on the part of the vendee; and an injury to the party complaining.[2] This, as we shall see, is too general a statement, for in certain cases of voluntary alienations proof of actual participation in the fraud by the vendee is not essential to annul the transaction. Again, these covinous alienations with respect to the rights of the creditors, existing and subsequent, and the character of the debtor's interest, are divisible into three classes. (1). Where a debtor conveys a title in fraud of creditors. (2). Where a person not indebted alienates property with the intention to defraud future creditors. (3). Where the property is paid for by the debtor, but the conveyance is taken in the name of a third party. Dillon, J., observed: "Any instrument is fraudulent which is a mere trick or sham contrivance, or which originates in bad motives or intentions, that is made and received for the purpose of warding off other creditors."[3] In another case[4] this language is quoted: "Whether the contract be oral or in writing; whether executed by the parties with all the solemnities of deeds by seal and acknowledgment; whether in form of the judgment of a court, stamped with judicial sanction, or carried out by the device of a corporation organized with all the forms and requirements demanded by the statute in that regard, if it be contaminated with the vice of fraud the law declares it to be a nullity. Deeds, obligations, contracts, judgments, and even corporate bodies may be the instruments through which

[1] Randall v. Vroom, 30 N. J. Eq. 358; 1 Story's Eq. Jur. § 353; Sayre v. Fredericks, 16 N. J. Eq. 205.

[2] Guidry v. Grivot, 2 Martin N. S. (La.) 13.

[3] Hughes v. Cory, 20 Iowa 405.

[4] Booth v. Bunce, 33 N. Y. 156.

parties may obtain the most unrighteous advantages. All such devices and instruments have been resorted to to cover up fraud, but whenever the law is invoked all such instruments are declared nullities; they are a perfect dead letter; the law looks upon them as if they had never been executed. They can never be justified or sanctified by any new shape or cover, by forms or recitals, by covenants or sanctions which the ingenuity, or skill, or genius of the rogue may devise." In a case before the Supreme Court of Maine it is said that "a fraudulent transfer, however perfect in form, is void" as to creditors.[1]

§ 16. **Fraudulent conveyances at common law—Statutes declaratory.**—By the rules of the common law all conveyances made in fraud of creditors were regarded as voidable at the instance and suit of such creditors.[2] The famous statutes of Elizabeth, to be presently considered, avoiding fraudulent conveyances, were merely declaratory of the common law;[3] the same result would have been worked out without the aid of the statutes.[4] The statutes were not necessary to this result;[5] but are to be received when such transfers are brought in question only as a true and accurate declaration of the common law.[6] Lord

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[1] Skowhegan Bank v. Cutler, 49 Me. 318.

[2] See notes to Twyne's Case (3 Rep. 80), 1 Smith's Leading Cases 1, continued from 1866 to 1879, in 18 American Law Register, N. S. 137; Cadogan v. Kennett, 2 Cowper 432; Curtis v. Leavitt, 15 N. Y. 124; Clements v. Moore, 6 Wall. 299, 312; Nellis v. Clark, 20 Wend. (N. Y.) 27; Blackman v. Wheaton, 13 Minn. 326; Stoddard v. Butler, 20 Wend. (N. Y.) 516; Clark v. Douglass, 62 Pa. St. 416; Brice v. Myers, 5 Ohio 121; Baker v. Humphrey, 101 U. S. 499; Hamilton v. Russel, 1 Cranch 310.

[3] Clements v. Moore, 6 Wall. 312; Davis v. Turner, 4 Gratt. (Va.) 429. See §§ 18–21.

[4] Cadogan v. Kennett, 2 Cowp. 432.

[5] Baker v. Humphrey, 101 U. S. 499; Clements v. Moore, 6 Wall. 299.

[6] Clark v. Douglass, 62 Pa. St. 416; Rickards v. Attorney Genl., 12 Cl. & F. 44. See Barton v. Vanheythuysen, 11 Hare 126–132; Ryall v. Rolle, 1 Atk. 178; Utterson v. Vernon, 3 T. R. 546. In Gardner v. Cole, 21 Iowa 209, Dillon, J., after remarking that the statutes 13 Eliz. and 27 Eliz. had never been legislatively re-enacted in Iowa, said: "But antedating as these statutes do the settlement of this country, and being mainly, if not wholly, de-

Coke[1] comments on the word "declare" in the statute as showing that this was the case, and Lord Mansfield, in Cadogan v. Kennett,[2] said that "the principles and rules of the common law, as now universally known and understood, are so strong against fraud in every shape, that the common law would have attained every end proposed by the statutes 13 Eliz. c. 5 and 27 Eliz. c. 4."[3] And Chancellor Kent asserted that the "statute of Elizabeth" was "only in affirmance of the principles of the common law."[4] This feature of our jurisprudence is of the highest importance, and creditors are justified in invoking it in cases where it is sought to defeat their claims as not coming exactly within the precise wording of the statute avoiding a particular kind of transfer. The flexible principles of the common law supplement and support the technical framework of the statute, and constitute the deep and broad foundation upon which the creditor's rights are founded. The mere omission of a provision embracing "goods, chattels, and things in action," from a section of the statute declaring void conveyances and assignments of estates or interests in land, made with intent to hinder, delay, or defraud creditors, will not be construed to be a repeal of the common-law rule which renders a conveyance of goods and chattels, made with such intent, fraudulent and void as to creditors.[5] In Fox v. Hills,[6] the statute concerning fraudulent conveyances was construed not to comprehend claims founded on tort,

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claratory of the common law, which sets a face of flint against frauds in every shape, they constitute the basis of American jurisprudence on these subjects, and are, in this State, part of the *unwritten law*."

[1] Co. Litt. 76a, 290b; Twyne's Case, 3 Rep. 82b (2 Coke, 219).

[2] 2 Cowp. 434.

[3] See Clements v. Moore, 6 Wall. 299; Starin v. Kelly, 88 N. Y. 421.

[4] Sands v. Codwise, 4 Johns. (N. Y.) 596; S. C. 4 Am. Dec. 313.

[5] Blackman v. Wheaton, 13 Minn. 331. "The principle of the court of equity is that a provision for the wife, contrived to conceal the means of the husband from his creditors by placing the ostensible title in her, though not within the statute of frauds, is void as to creditors, by the unwritten law." Bernheim v. Beer, 56 Miss. 151.

[6] 1 Conn. 298.

but it appearing that a voluntary deed had been given to avoid such a claim, the instrument was promptly adjudged void at common law as to the creditor. In Lillard v. McGee,[1] which was a suit to set aside a conveyance at the instance of a creditor whose claim was a judgment for damages in an action of slander, the court said: "Fraud is one of the main pillars of the jurisdiction of a court of equity, and there is no question of its competency, prior to the statute, to give relief in a case of this sort. Now as the statute is made in affirmance, not in derogation of the common law, it cannot have the effect of taking from a court of equity its jurisdiction; for it is a settled rule that an affirmative statute does not repeal the common law."

"The common law of England,"[2] says Roberts, "abhors every species of covin and collusion; but being tender of *presuming* fraud from *circumstances*, statutes have been specially framed to suit the exigencies of the times,[3] which are as fertile in the artifices of concealment as in the opportunities of deceit. It was the prevention and not the punishment of fraud in which the common law was defective, for there is no instrument or act which is not liable by the law of this country to be rendered absolutely void by clear and explicit evidence of fraudulent intention. So general, indeed, is the condemnation of all fraudulent acts by the law of England, that a fraudulent estate is said, in the masculine language of the books, to be no estate in the judgment of the law."

These words are employed in Alabama: "The right of the creditor to subject property of his debtor, fraudulently conveyed, is founded in that principle of the common law which enjoins integrity as a virtue paramount to generosity."[4]

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[1] 4 Bibb (Ky.) 166.

[2] Roberts on Fraudulent Conveyances (ed. 1807), p. 120.

[3] *Quæ natura videntur honesta esse, temporibus sunt inhonesta*, Cic. de Off. lib. 3.

[4] Planters' & Merchants' Bank v. Walker, 7 Ala. 946.

§ 17. Covinous transfers of choses in action.—By the law of England, before the American revolution, as established by decisions of Fortescue, M.R., Lord Hardwicke, and Lord Northington, fraudulent conveyances of choses in action, though not specified in the statute, were voidable equally with transfers of tangible assets, but from the nature of the subject-matter the remedy of the creditors must be sought in equity.[1]

Gray, C. J., in the opinion in Drake v. Rice,[2] says: "Of the only case before our Revolution cited in the learned argument for the claimant, we have but this brief note: 'A man, being much in debt, six hours before his decease gives £600 for the benefit of his younger children; this is not fraudulent as against creditors; though it would have been so of a real estate, or chattel real.'[3] The report, having been published in 1740, cannot have been unknown to the eminent English judges who made the decisions already cited; and, as observed by Lord Redesdale, the book is anonymous and of not much authority.[4] The opinions of the English and Irish courts of chancery since our Revolution, cited for the claimant, cannot outweigh the cases above referred to, as evidence of the law of England at the time of the separation of the colonies from the mother country. In the case at bar, it is agreed that the law of New York respecting fraudulent conveyances is the same as the common law and the law of Massachusetts; and that by the law of New York choses in action, although they cannot be attached or levied upon, yet may, after execution issued

[1] Drake v. Rice, 130 Mass. 410; Taylor v. Jones, 2 Atk. 600; King v. Dupine, 2 Atk. 603, note; Horn v. Horn, Ambler, 79; Ryall v. Rolle, 1 Atk. 165; S. C. 1 Ves. Sen. 348; Partridge v. Gopp, 1 Eden 163; S. C. Ambl. 596; Bayard v. Hoffman, 4 Johns. Ch. (N. Y.) 450; Hadden v. Spader, 20 Johns. (N. Y.) 554; Abbott v. Tenney, 18 N. H. 109; Sargent v. Salmond, 27 Me. 539. See § 33, and cases cited.

[2] 130 Mass. 413.

[3] Duffin v. Furness, Sel. Cas. Ch. 216.

[4] Barstow v. Kilvington, 5 Ves. 593, 598; Hovenden v. Annesley, 2 Sch. & Lef. 607, 634.

on a judgment at law, be reached by proceedings before a magistrate in the nature of proceedings under the poor debtor acts of this commonwealth, and by the appointment of a receiver to take and dispose of the debtor's property."[1]

§ 18. **Early statutes avoiding fraudulent conveyances.**— The widely known statute, 13 Eliz. c. 5 (1570), perpetuated by 29 Eliz. c. 5 (1587), was not by any means, as many suppose, the first legislative attempt to formulate and declare the principles of the common law on this subject, or to repress covinous transfers by statutory enactment. By 3 Hen. VII. c. 4 (1487), "all deeds of gift of goods and chattels made or to be made of trust to the use of the person or persons that made the same deed of gift," are declared "void and of none effect." And the prior act of 50 Edw. III. c. 6 (1376), reads as follows: "Divers people . . . . do give their tenements and chattels to their friends, by collusion to have the profits at their will, and after do flee to the franchise of Westminster, of St. Martin-le-Grand of London, or other such privileged places, and there do live a great time with an high countenance of another man's goods and profits of the said tenements and chattels, till the said creditors shall be bound to take a small parcel of their debt, and release the remnant, it is ordained and assented, that if it be found that such gifts be so made by collusion, that the said creditors shall have execution of the said tenements and chattels as if no such gift had been made." The statute, 2 Rich. II., stat. 2, c. 3 (1379), contained provisions on the same subject, and from its recitals was evidently framed to repress the hypocritical religious zeal of fraudulent debtors,[2] and to furnish a method of sub-

[1] See Donovan v. Finn, 1 Hopkins' Ch. (N. Y.) 59; s. c. 14 Am. Dec. 531, especially the learned note at page 542. See § 33.

[2] "ITEM, *in case of debt*, where the debtors make feigned gifts and feoffments of their goods and lands to their friends and others, and after withdraw themselves, and flee into places of holy church privileged, and there hold them a long time. and take the profit of their said lands and goods so given

stituted service of process.[1] The quaint provisions of these early statutes show conclusively that fraudulent conveyances are not entirely the offspring of our modern civilization. Fraud, which the common law so greatly abhorred, was so much practiced by debtors upon creditors in early times as to attract the attention of Parliament, and to constitute a subject of frequent legislation. "These statutes," said Lord Mansfield, "cannot receive too liberal a construction, or be too much extended in suppression of fraud."[2] It may be observed in explanation of this early legislation against fraudulent transfers that these statutes were enacted to more clearly formulate the common law with a view to suppress voluntary conveyances and secret trusts made by debtors who had escaped arrest for debt, or avoided service of process by fleeing to sanctuaries or holy ground. The number of these conveyances, however, was comparatively small, and their appearance is said to have been spasmodic and premature, and "far in advance of the time for their normal natural development." Sanctuaries, or cities of refuge for fraudulent and absconded debtors, do not seem

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by fraud and collusion, whereby their creditors have been long and yet be delayed of their debts and recovery, wrongfully and against good faith and reason; it is ordained and established, That after that the said creditors have thereof brought their writs of debt, and thereupon a *capias* awarded, and the sheriff shall make his return that he hath not taken the said persons because of such places privileged in which they be or shall be entered, then . . . . another writ shall be granted . . . . that proclamation be made openly at the gate of the place so privileged, where such persons be entered, by five weeks continually, every week once, that the same person be at a certain day, ... before the King's justices, and . . . . if the said persons called come not . . . . judgment shall be given against them upon the principal for their default. . . . . Execution shall be made of their goods and lands, being out of the place privileged, as well, that is to say, of those lands and goods so given by collusion, as of any other out of the same franchise, after that such collusion or fraud be duly found in the same manner as that ought to have been, if no devise had been thereof made, notwithstanding the same devise."

[1] By a Manx statute "all fraudulent assignments, or transfers of the debtor's goods or effects, shall be void, and of no effect against his just creditors." Mills' Statute Law of Isle of Manx, p. 238. Corlett v. Radcliffe, 14 Moore's C. P. 121–132.

[2] Cadogan v. Kennett, Cowp. 434.

to have been wholly abolished until during the reign of James I., and one such sanctuary, the noted White-friars, which flourished in the reign of that monarch, has been immortalized by Sir Walter Scott in his "Fortunes of Nigel."[1]

§ 19. **Statute 13 Eliz. c. 5, and its object.**—This statute was passed for the protection of creditors, and is the great model which has been re-enacted in substance, or copied wherever Anglican law prevails. The leading object of the statute was to prevent those collusive transfers of the legal ownership which place the property of a man indebted out of the reach of his *bona fide* creditors, and leave to him the beneficial enjoyment of that which ought in conscience to be open to their legal remedies.[2] By its provisions all conveyances and dispositions of property, real or personal, made with the intention of defrauding creditors, are declared to be null and void as against the creditors.[3] Mr. Reeves says that several acts had been formerly passed on the subject of fraudulent conveyances, "but none of them had gone so far" as the statutes 13 Eliz. and 27 Eliz. "to restrain these feigned gifts."[4] Mr. Justice Story observes that this statute (13 Eliz.) "has been universally adopted in America as the basis of our jurisprudence" upon the subject.[5] It may be found enacted almost intact in many of our statute-books, and is still popularly called "the statute of Elizabeth," just as statutory remedies for the trial of title to real property are known by the familiar title of ejectment. Professor Pomeroy says:[6] "The operative statute in England, which is also the basis of all legislation and judicial decision in the

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[1] Essay by John Reynolds, Esq., on Fraudulent Conveyances, etc., read before New York State Bar Association, Nov. 18, 1879.

[2] Roberts on Fraudulent Conveyances, p. 554.

[3] See Drake v. Rice, 130 Mass. 410.

[4] 5 Reeves' Hist. Eng. Law, pp. 244, 245.

[5] Story's Eq. Jur. § 353.

[6] 2 Pom. Eq. § 968.

United States, is the celebrated act 13 Eliz. c. 5." The general interpretation placed upon the statute of Elizabeth is well illustrated in a recent case in Maine,[1] in which the court say: "We derived our law in relation to conveyances fraudulent as to creditors, from the stat. 13 Eliz. c. 5, which has been adopted here as common law.[2] This statute, declaring that conveyances made with intent to 'delay, hinder, or defraud creditors,' shall be 'deemed and taken (only as against creditors, etc.) to be clearly and utterly void, frustrate, and of none effect,' has been invariably construed as plainly implying that they are valid as between the parties and their representatives;[3] and can be avoided only by creditors on due proceedings;[4] or their representatives, such as assignees in bankruptcy or insolvency of the grantor,[5] and the executors or administrators of grantors since deceased whose estates have been declared insolvent.[6] And notwithstanding the words 'utterly void,' etc., applied to such conveyances, they are not, even as to creditors, void but voidable;[7] and all the courts concur in holding that if the fraudulent grantee convey the premises to a *bona fide* purchaser for a valuable consideration before the creditor moves to impeach the original conveyance, the purchaser's title cannot be disturbed."[8]

§ 20. **Its interpretation and construction.**—"Notwithstanding," says Mr. Roberts, "these laws are greatly penal, the rule still holds of giving them an extended and liberal exposition."[9] Statutes in suppression of deceit and covin

[1] Butler v. Moore, 73 Maine 154.

[2] Howe v. Ward, 4 Me. 196, 199.

[3] Nichols v. Patten, 18 Me. 231; Andrews v. Marshall, 43 Me. 274; Benjamin on Sales, 3d Am. ed., p. 476, and note.

[4] Miller v. Miller, 23 Me. 22, Thompson v. Moore, 36 Me. 47; Stone v. Locke, 46 Me. 445.

[5] Freeland v. Freeland, 102 Mass. 475, 477.

[6] McLean v. Weeks, 65 Me. 411, 418.

[7] Andrews v. Marshall, 43 Me. 272.

[8] Neal v. Williams, 18 Me. 391; Hoffman v. Noble, 6 Met. (Mass.) 68; Bradley v. Obear, 10 N. H. 477.

[9] Roberts on Fraudulent Conveyances, p. 542. *In hiis enim quae sunt favorabilia animæ, quamvis sunt damnosa rebus, fiat aliquando extensio statuti.*

should be equitably expounded, although they are highly penal.[1] In McCulloch v. Hutchinson,[2] Sergeant, J., said: "The statutes on this subject are liberally expounded for the protection of creditors, and to meet the schemes and devices by which a fair exterior may be given to that which is in reality collusive."[3] "The statute," says Allen, J., "has always had a liberal interpretation, for the prevention of frauds."[4] The law "loves honesty and fair dealing," and "so construes liberally statutes to suppress frauds,[5] as far as they annul the fraudulent transaction."[6] As early as Twyne's Case,[7] it was resolved that "because fraud and deceit abound in these days more than in former times, ... all statutes made against fraud should be liberally and beneficially expounded to suppress the fraud." It may be suggested that in construing statutes to prevent frauds, suppress public wrongs, or effect a public good,—objects which the law favors,—there is a pressure toward a liberal interpretation; but if they also provide a penalty, which is a thing odious to the law, there is another pressure toward the strict rule; so the balance may be in equipoise, or the one scale or the other may preponderate, according to the special circumstances of the case, or the views of the particular judge.[8]

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[1] Wimbish v. Tailbois, Plowd. Com. 59. See Roy v. Bishop of Norwich, Hob. 75; Brice v. Myers, 5 Ohio 123.

[2] 7 Watts (Pa.) 435.

[3] See Cadogan v. Kennett, 2 Cowp. 432; Gooch's Case, 5 Rep. 60 (3 Coke, 121); Allen v. Rundle, 50 Conn. 31.

[4] Young v. Heermans, 66 N. Y. 383. See Pennington v. Seal, 49 Miss. 525.

[5] Citing Twyne's Case, 3 Rep. 80b (2 Coke, 212); Cadogan v. Kennett, 2 Cowp. 432–434.

[6] Bishop on the Written Laws, § 192. "Statutes against frauds are to be liberally and beneficially expounded. This may seem a contradiction to the last rule [that penal statutes are to be construed strictly]; most statutes against frauds being in their consequences penal. But this difference is here to be taken: where the statute acts upon the offender and inflicts a penalty, as a pillory or a fine, it is then to be taken strictly; *but when the statute acts upon the offense*, by setting aside the fraudulent transaction, here it is to be construed liberally." 1 Bl. Com. 88. See Carey v. Giles, 9 Ga. 253; Cumming v. Fryer, Dudley (Ga.) 182; Ellis v. Whitlock, 10 Mo. 781.

[7] 3 Rep. 82a (2 Coke, 219).

[8] Compare Taylor v. United States, 3 How. 197; Fairbanks v. Antrim, 2 N. H. 105; Abbott v. Wood, 22 Me.

The provisions of the statute are considered to be so plain that "he that runs may read."[1]

§ 21. Statute 27 Eliz. c. 4.—This statute was enacted in favor of purchasers, and renders void as against subsequent purchasers of the same land all conveyances, etc., made with the intention of defeating them, or containing a power of revocation. Mr. May observes[2] that "in one respect, however, both these statutes were moulded in strict conformity with the rules of the common law; for if 'simplicity was the striking feature of the common law,'[3] it was in an almost equal degree the chief feature of the statutes of Elizabeth, which are couched in very general terms, so as to include, and allow their application by the courts to any fraudulent contrivances to which the fertility of man's imagination might have resorted, as a means of eluding a more precise and inflexible law."[4]

§ 22. Twyne's Case.[5]—This celebrated case is the creditor's beacon-light in suits to annul covinous transfers. The decision was promulgated in 1601, thirty years after the enactment of the statute 13 Eliz. c. 5. Evidently covinous

541; Sickles v. Sharp, 13 Johns. (N. Y.) 497; Van Valkenburgh v. Torrey, 7 Cow. (N. Y.) 252. In construction the courts will strive "to make atonement and peace among the words."

[1] See Savage v. Knight, 92 N. C. 497.

[2] May on Fraudulent Conveyances (London, 1871), p. 3.

[3] Citing Sugden on Powers, Introduction, p. 1.

[4] As to the interpretation of these statutes as applied to *bona fide* purchasers, see Bean v. Smith, 2 Mason 272, per Story, J., reviewing Roberts v. Anderson, 3 Johns. Ch. (N. Y.) 371, per Chancellor Kent. In Mulford v. Peterson, 35 N. J. Law 133, the court said: "The statute, 13 Eliz. c. 5, makes utterly void, frustrate, and of no effect, every feoffment, gift, grant, alienation, bargain, and conveyance of lands, tenements, goods, and chattels, or any of them, devised and contrived to delay, hinder, or defraud creditors, as against such creditors, any pretence, color, feigned consideration, expressing of use, or any other matter or thing to the contrary. By the 27 Eliz. c. 4, conveyances made to defraud subsequent purchasers are declared void as to persons defrauded. In both statutes a penalty is provided for, which parties to such conveyances, or such as are privy to or knowing of such fraud, incur, who shall put in use or maintain, justify, or defend, such conveyances as made *bona fide* or upon good consideration."

[5] 3 Rep. 80 (2 Coke, 212); 1 Smith's Lea. Cas. 1; 18 Am. Law Reg. N. S. 137.

dispositions of property were at that time beginning to attract attention and become troublesome, for, as already shown, it was resolved that "because fraud and deceit abound in these days more than in former times, all statutes made against fraud should be liberally and beneficially expounded to suppress the fraud." It appeared, in this case, that P. was indebted to T. in £400, and was indebted also to C. in £200. C. brought an action of debt against P., and pending the writ P., being possessed of goods and chattels of the value of £300, *secretly* made a general deed of gift of all his goods and chattels, real and personal whatsoever, to T., in satisfaction of his debt; notwithstanding which P. continued in possession of the goods, some of which he sold again, sheared the sheep, and marked them with his own mark. Afterwards C. had judgment against P. and took out a *fieri facias* directed to the sheriff of Southampton, who, by force of the writ, came to levy upon the goods. Divers persons, by the command of T., resisted the sheriff by force, claiming the goods as the goods of T. by virtue of the gift; and whether the gift, on the whole matter, was a good gift, or fraudulent and void within the 13 Eliz. c. 5, was the question. It was determined by the Lord Keeper of the Great Seal, by the Chief-Justices, and by the whole Court of Star Chamber that the gift was fraudulent within the statute. And as the signs and marks of fraud, it was said by the court: (1). That the gift was general, without exception of the donor's apparel, or of anything of necessity. (2). The donor continued in possession, and used the goods as his own; and by means thereof traded with others, and defrauded and deceived them. (3). It was made in secret. (4). It was made pending the writ. (5). There was a trust between the parties; for the donor possessed all, and used them as his proper goods; and fraud is always apparelled and clad with a trust, and a trust is the cover of fraud. (6). The deed expressed that the gift was

made honestly, truly and *bona fide; et clausulæ inconsueta semper inducunt suspicionem.*[1] This case is popularly regarded as the fountain from which our modern law as to fraudulent conveyances flows, and the profession frequently refer to and draw from it in preference to selecting from the "myriad of precedents" and "single instances" which financial crises and the greed of dishonest debtors have since called into being. The leading doctrine taught by this case has been practically superseded in England, but it still holds a prominent place in our jurisprudence. This may be likened to the use of statutory real writs in parts of the United States after their complete abandonment in the mother country.[2] The exact point decided in Twyne's Case is that a conveyance by a debtor of tangible property, if actually fraudulent, is void as to existing creditors. The impression that the principles of this case are sufficient to meet the exigencies of our modern jurisprudence is clearly erroneous. Though Twyne's Case has been characterized as a "wonderful decision," and amazement has been expressed that the question involved should have come up for adjudication at such an early period, yet it must be conceded that the facts of the case were too restricted to enable the court to furnish rules sufficient to answer all the varying imperative demands of creditors at the present day. Since this great

[1] See Roberts on Fraudulent Conveyances (ed. 1845), pp. 544, 545. Lord Eldon, in Kidd v. Rawlinson, 2 Bos. & P. 59, cited with approval from Buller's Nisi Prius, where the following synopsis of Twyne's Case may be found: "A., being indebted to B. in £400, and to C. in £200, C. brings debt, and hanging the writ, A. makes a secret conveyance of all his goods and chattels to B. in satisfaction of his debt, but continues in possession, and sells some, and sets his mark on other sheep; and it was holden to be fraudulent within this act: (1) because the gift is general; (2) the donor continued in possession and used them as his own; (3) it was made pending the writ, and it is not within the proviso, for though it is made on a good consideration, yet it is not *bona fide*. But yet the donor continuing in possession, is not in all cases a mark of fraud; as where a donee lends his donor money to buy goods, and at the same time takes a bill of sale of them for securing the money." Bull. Nisi Prius, p. 258.

[2] See Sedg. & Wait on Trial of Title to Land, 2d ed., §§ 72–76, c. II.

decision was rendered its principles have been extended, as we shall presently see, to avoid covinous conveyances not only as to existing creditors, but in certain cases as to subsequent creditors,[1] and even as to contingent subsequent creditors;[2] so it has been held to embrace creditors who were suing the debtor for tort,[3] as for slander,[4] or assault and battery,[5] or the misapplication of trust moneys more than fifteen years before the conveyance.[6] The statutes "are not limited in their operation by any Procrustean formula."[7] So the doctrine of the case has been enlarged to cover transfers of intangible rights and choses in action, such as stocks,[8] transfer of an annuity,[9] of a policy of life insurance,[10] of an equity of redemption,[11] of certificates of stock,[12] of a legacy,[13] insurance premiums,[14] and all mere choses in action.[15] Even an allowance for support to a wife under a judgment for divorce may be reached by her creditors.[16] Still Twyne's Case has taken deep hold in our law,

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[1] See Laughton v. Harden, 68 Me. 212; Day v. Cooley, 118 Mass. 527.

[2] See Jackson v. Seward, 5 Cow. (N. Y.) 71; Pennington v. Seal, 49 Miss. 525; Hoffman v. Junk, 51 Wis. 614. See Chap. VI.

[3] See Post v. Stiger, 29 N. J. Eq. 558; Weir v. Day, 57 Iowa 87; Langford v. Fly, 7 Hum. (Tenn.) 585; Walradt v. Brown, 6 Ill. 397; Gebhart v. Merfeld, 51 Md. 325; Cooke v. Cooke, 43 Md. 522; Fox v. Hills, 1 Conn. 295.

[4] Jackson v. Myers, 18 Johns. (N. Y.) 425; Cooke v. Cooke, 43 Md. 531; Wilcox v. Fitch, 20 Johns. (N. Y.) 472.

[5] Ford v. Johnston, 7 Hun (N. Y.) 567; Slater v. Sherman, 5 Bush (Ky.) 206.

[6] Strong v. Strong, 18 Beav. 408.

[7] Beckwith v. Burrough, 14 R. I. 368.

[8] Bayard v. Hoffman, 4 Johns. Ch. (N. Y.) 450, per Chancellor Kent; Hadden v. Spader, 20 Johns. (N. Y.) 554; Weed v. Pierce, 9 Cow. (N. Y.) 723, per Chancellor Walworth; Edmeston v. Lyde, 1 Paige (N. Y.) 641; Beckwith v. Burrough, 14 R. I. 366.

[9] Norcutt v. Dodd, 1 Cr. & Ph. 100.

[10] Stokoe v. Cowan, 29 Beav. 637; Skarf v. Soulby, 1 Macn. & G. 364; *In re* Trustee Relief Act, 5 De G. & S. 1; Burton v. Farinholt, 86 N. C. 260; Ætna Nat. Bank v. Manhattan Life Ins. Co., 24 Fed. Rep. 769.

[11] Sims v. Gaines, 64 Ala. 397.

[12] Scott v. Indianapolis Wagon Works, 48 Ind. 78.

[13] Bigelow v. Ayrault, 46 Barb. (N. Y.) 143.

[14] Ætna Nat. Bank v. United States Life Ins. Co., 24 Fed. Rep. 770.

[15] Greenwood v. Brodhead, 8 Barb. (N. Y.) 597; Drake v. Rice, 130 Mass. 410.

[16] Stevenson v. Stevenson, 34 Hun (N. Y.) 157.

and the main principles that control the determination of the different phases of fraudulent conveyances can generally be traced to this parent root. That the case should at this late day be so widely cited and relied upon is conclusive proof that it embodies a forcible exposition of sound and necessary rules affecting covinous transfers, which neither lapse of time nor change in circumstances can supersede. The case attains the same relative prominence as a precedent in the authorities that is accorded to the statute 13 Eliz. c. 5, as a model for modern legislative enactments. It seems indeed strange that so many evidences and badges of fraud, common with us now, should have concentrated in such an early case, and should have been so swiftly and skilfully detected and labelled. If the facts of this case are not partially fictitious, and there is little reason to credit the intimation that they are, then it follows that the methods and devices of the fraudulent debtor have undergone few alterations since this remarkable decision was promulgated.

CHAPTER II.

PROPERTY SUSCEPTIBLE OF FRAUDULENT ALIENATION.—ASSETS AVAILABLE TO CREDITORS.

§ 23. What interests may be reached.
24. Tangible property and intangible interests.
25. English statutes and authorities.
26. Recovering improvements—Rents and profits.
27. Rule as to crops.
28. Property substituted or mingled.
29. Estates in remainder and reversion.
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43. Enforcing promises of third parties.
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45. Income of trust estate.
46. Rule as to exempt property.
47. Fraudulent purchases of exempt property.
48. Covinous alienations of exemptions.
49. Conflicting cases.
50. Abandoned exemptions.
50*a*. What cannot be reached.

§ 23. **What interests may be reached.**—Having considered the early statutes and authorities relating to covinous alienations,[1] and taken a general view of the subject, it becomes necessary next to discuss the various classes of property, and the rights and equitable interests of debtors, which may constitute the subject-matter of fraudulent alienations, or which can be reached by creditors' bills or other appropriate remedies, or through the instrumentality of a receiver, liquidator, or assignee. We have already seen that in general one of the requisites of a fraudulent transfer is that the property or thing disposed of by the debtor must be of some value, out of which the creditor might have realized the whole or a portion of his claim.[2] Hence, where a debtor cancelled upon his books, without consider-

[1] See §§ 19–22.

[2] See § 15.

ation, an old account against one who was insolvent, it was said that the transaction did not amount to a disposition of property with intent to defraud creditors.[1] The foundation of this ruling is self-evident. The court will not interest itself in any attempt to extend relief to a creditor unless its process and judgment can be rendered practically effectual, and as a result of its action a substantial benefit can be conferred upon the creditor. If the property transferred and sought to be reached and subjected to the process of the court is not liable to execution,[2] or if the debtor has no beneficial interest in it, the court will not inquire into the modes or motives of its disposition. Such an inquiry would be futile. In Hamburger v. Grant,[3] it appeared that the amount of the indebtedness to the complainant was three dollars and fifty cents. In an action to cancel a fraudulent conveyance, Kelly, J., observed: "The interposition of a court of equity ought not to be asked to set aside a deed on the ground of fraud for such a small sum of money."[4] The value of the assigned property is always important as bearing upon the question of fraud.[5] It is difficult to understand how a transfer of property which is of no value,[6] or in which the creditor has no substantial interest,[7] can be considered as in fraud of creditors.[8] In New

[1] Hoyt v. Godfrey, 88 N. Y. 669.

[2] See § 46.

[3] 8 Oregon 182.

[4] Compare Ithaca Gas Light Co. v. Treman, 93 N. Y. 660; Chapman v. Banker & Tradesman Pub. Co., 128 Mass. 478; Smith v. Williams, 116 Mass. 510, 513.

[5] By the former chancery practice in New York if the amount or value in dispute did not exceed $100 the defendant could, under the statute and rule, raise the objection that the sum in controversy was beneath the dignity of the court, and thus secure a dismissal of the bill (see Shepard v. Walker, 7 How. Pr. (N. Y.) 46; Douw v. Shelden, 2 Paige (N. Y.) 323; Smets v. Williams, 4 Paige (N. Y.) 364; Thomas v. McEwen, 11 Paige (N. Y.) 131), but the statute and practice have since been changed and equitable actions involving less than $100 will now be entertained in that State. Marsh v. Benson, 34 N. Y. 358; Braman v. Johnson, 26 How. Pr. (N. Y.) 27.

[6] Stacy v. Deshaw, 7 Hun (N. Y.) 451. See § 41.

[7] Youmans v. Boomhower, 3 T. & C. (N. Y.) 21.

[8] In Garrison v. Monaghan, 33 Pa. St. 234, the court said: "The deeds by

York it is provided by statute that insurance may be placed upon a husband's life for the sole benefit of his wife free from creditors.[1] Policies of this kind are held, in a general sense, not to be assignable by the wife.[2] In a case, however, where a wife assigned such a policy to her children, and her creditors sought to avoid the transfer, it was held that they were not in a position to do so, but the transfer was to be regarded in the light of a disposition of property exempt from execution, concerning which the creditor had no right to complain.[3] A married man, we may here ob-

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which these premises passed to the defendant were clearly fraudulent and void, and the sheriff's sale, therefore, vested the real title to them in the purchaser and his assigns. It is, therefore, his land, and as he takes it freed from all judgments and liens, except the reduced ground-rent of $50, no one claiming under the defendant in the execution can pretend to hold it against him upon the ground that it has or had no value. If I have a title to real or personal property, no person can withhold it from me upon the simple allegation that it is of no value, and then ask to have that question submitted to a jury. The case of Fassit v. Phillips, 4 Whart. (Pa.) 399, which proceeded on this erroneous principle, has been repeatedly overruled, after giving rise to numberless lawsuits." It is apparently regarded as a most dangerous innovation upon the well-settled principle that the owner of real or personal estate, who is entitled to its possession, shall enjoy it himself, and that a stranger will not be heard to assert that the property is worth nothing when called upon to restore it to the true owner. This may seem to conflict with the text. While the argument of the learned court as to the right of an owner to recover his property, even though it is without pecuniary value, is sound, yet, technically speaking, a creditor cannot be regarded as the owner of his debtor's property. Especially in cases where the creditor appeals to the equity side of the court, and seeks a discovery of assets, the machinery of justice ought not to be set in motion to reach property of trivial or nominal value. It is not easy to see how property of this character can be the subject of a fraudulent design. See French v. Holmes, 67 Me. 190. Hopkirk v. Randolph, 2 Brock. 140.

[1] Laws of New York, 1840, c. 80.

[2] Eadie v. Slimmon, 26 N. Y. 9; Barry v. Equitable Life Assurance Society, 59 N. Y. 587.

[3] Smillie v. Quinn, 25 Hun (N. Y.) 332. See § 46. Insurance placed upon his life by an insolvent for the benefit of his wife, is not necessarily in fraud of creditors. Thompson v. Cundiff, 11 Bush (Ky.) 567. Compare Nippes' Appeal, 75 Pa. St. 478; Gould v. Emerson, 99 Mass. 154; Durian v. Central Verein, 7 Daly (N. Y.) 171; Leonard v. Clinton, 26 Hun (N. Y.) 290. And in order to maintain an action in behalf of creditors of a deceased person against a life insurance company to recover premiums alleged to have been fraudulently paid by the decedent while insolvent, for the benefit of his family, it must be alleged and proved that the

serve, has a right to devote a reasonable portion of his earnings to life insurance for the benefit of his family.[1] It has been said to be a well-settled rule that a creditor's bill, filed for the purpose of removing a fraudulent obstruction, must show that such removal will enable the judgment to attach upon the property;[2] hence a valid general assignment will supplant a creditor's proceedings to cancel an instrument[3] such as a mortgage[4] if the assignee and not the creditor would be the party benefited by a successful issue in the suit.

§ 24. **Tangible property and intangible interests.**—What interests then can be reached by creditors? Manifestly all *tangible* property, whether real or personal, which would have been subject to levy and sale under execution, is susceptible of fraudulent alienation, and may be reclaimed and recovered by the creditor where it has been transferred by the debtor with a fraudulent intention. The line is not drawn here, however. The manifest tendency of the authorities is to reclaim every species of the debtor's property, prospective or contingent, for the creditor. As has been shown, transfers of intangible interests[5] and rights in action, stocks,[6] annuities,[7] life insurance policies,[8] book

company participated in the fraud. Washington Central Bank v. Hume, 128 U. S. 195.

[1] Washington Central Bank v. Hume, 128 U. S. 195.

[2] Spring v. Short, 90 N. Y. 545. See Geery v. Geery, 63 N. Y. 252; Southard v. Benner, 72 N. Y. 424.

[3] Childs v. Kendall, 17 Weekly Dig. (N. Y.) 546.

[4] Spring v. Short, 12 Weekly Dig. (N. Y.) 360; affi'd 90 N. Y. 545. But see Leonard v. Clinton, 26 Hun (N. Y.) 288.

[5] A bare possession or possibility cannot be reached by creditors: Smith v. Kearney, 2 Barb. Ch. (N. Y.) 533; Waggoner v. Speck, 3 Ohio 293; nor can they enforce a moral claim which a debtor may have upon the conscience of an executor. Sparks v. De La Guerra, 18 Cal. 676.

[6] Bayard v. Hoffman, 4 Johns. Ch. (N. Y.) 450; Weed v. Pierce, 9 Cow. (N. Y.) 723; Edmeston v. Lyde, 1 Paige (N. Y.) 641.

[7] Norcutt v. Dodd, 1 Craig & Ph. 100.

[8] Burton v. Farinholt, 86 N. C. 260; Stokoe v. Cowan, 29 Beav. 637; Jenkyn v. Vaughan, 3 Drew. 419; Anthracite Ins. Co. v. Sears, 109 Mass. 383.

royalties,[1] patent rights,[2] property of imprisoned felons,[3] legacies,[4] and choses in action generally,[5] may be reached. It has been observed[6] that the principle toward which the highest courts in England and in all the States are more or less rapidly working is: "That the entire property of which a debtor is the real or beneficial owner, constitutes a fund which is primarily applicable, to the fullest extent of its entire value, to the payment of its owner's debts. And the courts will not allow any of that value to be withdrawn from such primary application, if they can find any legal or equitable ground on which to prevent such withdrawal."

Creditors should remember that whether an equitable interest in real estate is liable to be appropriated by legal process to the payment of the debts of the beneficiary is to be determined by the local law where the property has its *situs*.[7]

§ 25. **English statutes and authorities.**—Mr. May, an English writer upon this general subject of fraudulent alienations, speaking of the kinds of property or interests which may be reached by creditors, says:[8] "The preamble of the 13 Eliz. c. 5, declares it to be made 'for the avoiding and abolishing of feigned, covinous, and fraudulent feoffments, gifts,' etc., 'as well of lands and tenements as of goods and chattels,' made to delay or defraud creditors; and it seems that under this description are included all kinds of property, real and personal, legal and equitable,[9] vested, rever-

[1] Lord v. Harte, 118 Mass. 271.

[2] Barnes v. Morgan, 3 Hun (N. Y.) 704.

[3] Matter of Nerac, 35 Cal. 392.

[4] Bigelow v. Ayrault, 46 Barb. (N. Y.) 143.

[5] Drake v. Rice, 130 Mass. 410; Pendleton v. Perkins, 49 Mo. 565; Powell v. Howell, 63 N. C. 283; Edmeston v. Lyde, 1 Paige (N. Y.) 637; Stinson v. Williams, 35 Ga. 170; Rogers v. Jones, 1 Neb. 417; City of Newark v. Funk, 15 O. S. 462; Hitt v. Ormsbee, 14 Ill. 233; Tantum v. Green, 21 N. J. Eq. 364. But compare Stewart v. English, 6 Ind. 176; Wallace v. Lawyer, 54 Ind. 501; Grogan v. Cooke, 2 Ball & B. 233; Nantes v. Corrock, 9 Ves. 188.

[6] Essay by John Reynolds, Esq., cited *supra*.

[7] Spindle v. Shreve, 111 U. S. 542; Nichols v. Levy, 5 Wall. 433. See Nichols v. Eaton, 91 U. S. 716-729.

[8] May on Fraudulent Conveyances. p. 17.

[9] Ashfield v. Ashfield, 2 Vern. 287.

sionary,[1] or contingent,[2] which are subject to the payment of debts, or liable to be taken in execution at the time of the fraudulent conveyance."[3] Generally speaking, the same general principle and rule of interpretation may be deduced from the American authorities.[4]

§ 26. Recovering improvements—Rents and profits.—An extreme illustration of the disposition of the courts to favor creditors is the familiar and salutary rule that improvements placed by a debtor upon real property of another, acting in concert with him to defraud creditors, can be followed, and the realty charged in favor of creditors of the debtor with the value of such improvements.[5] In Isham v. Schafer,[6] Johnson, J., said: "Where no debt has been created between the parties to the fraudulent transaction, and the personal property of the judgment-debtor has merged in, and become part of the real estate of another in this way, the appropriate, if not the only remedy is to fasten the judgment upon the real estate to the extent of the judgment-debtor's property thus made part of the realty." In

[1] Ede v. Knowles, 2 Y. & C. N. R. 172.

[2] French v. French, 6 De G., M. & G. 95.

[3] Sims v. Thomas, 12 Adol. & El. 536; Turnley v. Hooper, 2 Jur. (N. S.) 1081.

[4] Mr. May further observes: "By 1 and 2 Vict. c. 110, many kinds of property have been made available to creditors for the payment of debts. So that now copyhold land [1 and 2 Vict. c. 110, s. 11, and see Bott v. Smith, 21 Beav. 511], money and banknotes [ibid. § 12, Barrack v. McCulloch, 3 K. & J. 110; Collingridge v. Paxton, 11 C. B. 683] (whether of the Bank of England or of any other bank or bankers), and any cheques, bills of exchange, promissory notes, bonds, specialties, or other securities for money [Spirett v. Willows, 11 Jur. (N. S.) 70], and stock and shares in public funds and public companies [1 and 2 Vict. c. 110, §§ 14 and 15; Warden v. Jones, 2 De G. & J. 76; Goldsmith v. Russell, 5 De G., M. & G. 547], are to be considered as 'goods and chattels' within the meaning of this section [13 Eliz. c. 5, § 1]." May on Fraudulent Conveyances, p. 21.

[5] See Rose v. Brown, 11 W. Va. 137; Heck v. Fisher, 78 Ky. 644; Robinson v. Huffman, 15 B. Mon. (Ky.) 82; Athey v. Knotts, 6 B. Mon. (Ky.) 29; Sexton v. Wheaton, 8 Wheat. 229; Kirby v. Bruns, 45 Mo. 234; Lockhard v. Beckley, 10 W. Va. 87; Burt v. Timmons, 29 W. Va. 453; Dietz v. Atwood, 19 Brad. (Ill.) 99; Isham v. Schafer, 60 Barb. (N. Y.) 317; but compare Webster v. Hildreth, 33 Vt. 457; Caswell v. Hill, 47 N. H. 407.

[6] 60 Barb. (N. Y.) 330.

a New Hampshire case it was held that a guardian could not purchase property and place it on the land of his ward to the injury of his creditors;[1] but the property was not attached to the freehold, and the doctrine may well be doubted whether an infant's land can be subjected to the claims of creditors against a debtor who has placed improvements on it.[2] In Lynde v. McGregor,[3] where it appeared that an insolvent husband had made extensive expenditures upon lands belonging to his wife, and had increased the value of the estate, Gray, J., observed: "The amount of such increase in value, for which no consideration has been paid by the wife, and which has been added to her estate by the husband in fraud of his creditors, in equity belongs to them, and may be made a charge upon the land for their benefit." Temporary or perishable improvements,[4] which do not add to the permanent value of the land, cannot ordinarily be reached.

It is certainly reasonable, and it seems to be clear, that rents and profits can be recovered from a fraudulent grantee who holds the property under a secret trust for the debtor.[5] A creditor, by filing a bill after the return of an execution unsatisfied, may also obtain a lien upon the rents and profits of the real estate of his judgment-debtor, which accrue during the fifteen months allowed by law to redeem the premises from a sale by the sheriff on execution, and satisfaction of the judgment may be decreed out of such rents and profits. The chancellor said: "Upon what principles of justice or equity can the debtor claim to retain the whole

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[1] Tenney v. Evans, 14 N. H. 343; S. C. 40 Am. Dec. 194.

[2] Mathes v. Dobschuetz, 72 Ill. 438. Compare Washburn v. Sproat, 16 Mass. 449.

[3] 13 Allen (Mass.) 182.

[4] See Sedgwick & Wait on Trial of Title to Land, 2d ed., § 702; Dick v. Hamilton, 1 Deady 322.

[5] Marshall v. Croom, 60 Ala. 121. See Kipp v. Hanna, 2 Bland's Ch. (Md.) 26; Robinson v. Stewart, 10 N. Y. 190. Compare Edwards v. Entwisle, 2 Mackey (D. C.) 43; Hadley v. Morrison, 39 Ill. 392; Thompson v. Bickford, 19 Minn. 17.

rents and profits of a large real estate, for the period of fifteen months, when such rents and profits are necessary to pay the debts which he honestly owes to his creditors?"[1] In Loos v. Wilkinson,[2] Earl, J., used these words: "These debtors could no more give away the rents and profits of their real estate than they could give away the real estate itself."[3]

§ 27. **Rule as to crops.**—The same general principle pervades the cases as to growing crops. Thus, in Fury v. Strohecker,[4] it was decided that a judgment-creditor was entitled to resort to crops grown upon the land of his debtor after it had been transferred in fraud of his rights, so far at least as the fraudulent grantor retained an interest in them by an understanding with the grantee; and where there was reason to suppose such collusion existed all doubts should be solved in the creditor's favor.[5] And in Massachusetts it was decided that if a debtor conveyed land to his wife, with a design to defraud his creditors, and the wife participated in the intent, hay cut on the land was liable to be taken on execution to satisfy the claim of a creditor of the husband, upon a debt contracted subsequent to the conveyance.[6]

§ 28. **Property substituted or mingled.**—Property cannot be placed beyond the reach of creditors by a change in its form or character. It may be traced and identified. In McClosky v. Stewart,[7] the creditor sought to reach certain machinery, tools, etc., constituting the "plant" of a

[1] Farnham v. Campbell, 10 Paige (N. Y.) 598-601. See Campbell v. Genet, 2 Hilt. (N. Y.) 296; Dow v. Platner, 16 N. Y. 565; Schermerhorn v. Merrill, 1 Barb. (N. Y.) 517; Strong v. Skinner, 4 Barb. (N. Y.) 558.

[2] 110 N. Y. 214.

[3] But compare Robinson v. Stewart, 10 N. Y. 189; Collumb v. Read, 24 N. Y. 505.

[4] 44 Mich. 337.

[5] Compare Pierce v. Hill, 35 Mich 201; Peters v. Light, 76 Pa. St. 289; Jones v. Bryant, 13 N. H. 53; Garbutt v. Smith, 40 Barb. (N. Y.) 22.

[6] Dodd v. Adams, 125 Mass. 398.

[7] 63 How. Pr. (N. Y.) 142. See Lehman v. Kelly, 68 Ala. 192.

business fraudulently transferred, and the defendant attempted to limit the recovery to such property as was in existence at the time of the transfer. The court declined to apply this rule to the new tools and machinery which had been purchased for the purpose of supplying the waste incident to ordinary wear and tear. The parties in possession having had the benefit of the machinery and tools, and having partially worn them out in the business, might be said to have had the benefit of the waste, and there was no reason in law or in equity why the repairs and new tools, which were rendered necessary to supply such waste, should not follow the property itself.[1]

§ 29. **Estates in remainder and reversion.**—A vested remainder in fee is liable for debts in the same way as an estate vested in possession. Though the time of possession is dependent upon the termination of a life estate, this only lessens its value for the time being. The liability of the estate to creditors is not in the least affected. In Nichols v. Levy,[2] Swayne, J., delivering the opinion of the United States Supreme Court, said: "It is a settled rule of law that the beneficial interests of the *cestui que trust*, whatever it may be, is liable for the payment of his debts. It cannot be so fenced about by inhibitions and restrictions as to secure to it the inconsistent characteristics of right and enjoyment to the beneficiary and immunity from his creditors. A condition precedent, that the provision shall not vest until his debts are paid, and a condition subsequent, that it

[1] It was further decided in this same case that where a fraudulent transferee mingled his own property with that which he had fraudulently received, he would not be allowed to claim that the property so mingled should subsequently be assorted and set aside for the payment of the creditors. The inference seems to be that he would lose it all. If the property could be readily identified and separated it is difficult to see why this harsh rule should be applied. Compare Hooley v. Gieve, affirmed 82 N. Y. 625, on opinions in New York Common Pleas; S. C. 9 Abb. N. C. (N. Y.) 8, 41, and note of the editor; Dow v. Berry, 17 Fed. Rep. 121; Smith v. Sanborn, 6 Gray (Mass.) 134; The "Idaho," 93 U. S. 575.

[2] 5 Wall. 433.

shall be divested and forfeited by his insolvency, with a limitation over to another person, are valid, and the law will give them full effect. Beyond this, protection from the claims of creditors is not allowed to go."[1] In French v. French,[2] it was held that a contingent reversionary interest is within the statute.[3]

§ 30. **Equitable interests.**—Equitable interests constitute a frequent subject-matter of creditors' suits. In Sanford v. Lackland,[4] the learned Dillon, J., held that if property was given to trustees to hold for A. until he reached the age of twenty-six years, when it was to be paid over to him, and A. became bankrupt before he arrived at twenty-six, his assignee in bankruptcy was entitled to the property. Chief-Justice Gray, in Sparhawk v. Cloon,[5] says, that "the equitable estate for life is alienable by, and liable in equity to the debts of the *cestui que trust*, and that this quality is so inseparable from the estate, that no provision, however express, which does not operate as a cesser, or limitation of the estate itself, can protect it from his debts."[6] We shall presently consider the cases, which must be distinguished from the ones just cited, in which it is held that the founder of a trust may secure the enjoyment of it to other persons, the objects of his bounty, by providing that it shall not be

[1] Citing Graves v. Dolphin, 1 Simon 66; Mebane v. Mebane, 4 Ired. Eq. (N. C.) 131; Bank v. Forney, 2 Ired. Eq. (N. C.) 181–184; Snowdon v. Dales, 6 Simon 524; Foley v. Burnell, 1 Bro. C. C. 274; Brandon v. Robinson, 18 Ves. 429; Piercy v. Roberts, 1 Mylne & K. 4; Dick v. Pitchford, 1 Dev. & Bat. (N. C.) Eq. 484.

[2] 6 De G., M. & G. 95. See Neale v. Day, 28 L. J. Ch. 45.

[3] A contingent remainder is not subject to execution. Jackson v. Middleton, 52 Barb. (N. Y.) 9; Watson v. Dodd, 68 N. C. 528.

[4] 2 Dillon 6.

[5] 125 Mass. 266.

[6] See Brandon v. Robinson, 18 Ves. 429; s. c. 1 Rose 197; Rochford v. Hackman, 9 Hare 475; 2 Spence's Eq. Jur. 89, and cases cited; Tillinghast v. Bradford, 5 R. I. 205; Mebane v. Mebane, 4 Ired. Eq. (N. C.) 131; Heath v. Bishop, 4 Rich. Eq. (S. C.) 46; Smith v. Moore, 37 Ala. 327; McIlvaine v. Smith, 42 Mo. 45; Sanford v. Lackland, 2 Dillon 6; Walworth, C., in Hallett v. Thompson, 5 Paige (N. Y.) 583, 585; Comstock, J., in Bramhall v. Ferris, 14 N. Y. 41, 44; Swayne, J., in Nichols v. Levy, 5 Wall. 433, 441.

alienable by them, or be subject to be taken by their creditors, and that his intentions in this regard will, in certain cases, be respected by the courts.[1]

A creditor's bill, through the instrumentality of a receiver, will reach the interest of the debtor in his deceased father's estate;[2] so an inchoate interest such as a tenancy by the courtesy,[3] and a widow's dower,[4] may be reached by the aid of a court of equity.

§ 31. **Equity of redemption.**—In a controversy which arose in Alabama,[5] it was said that, aside from constitutional and statutory exemptions, a debtor could not own any property or interest in property which could not be reached and subjected to the payment of his debts, and that an equity of redemption was property, and was a valuable right, capable of being subjected to the payment of debts, in courts of law and in equity; and hence a transaction by which an embarrassed debtor concealed the existence of such an interest from his creditors must necessarily hinder and delay them.[6]

§ 32. **Reservations.**—Debtors often make reservations in conveyances for their own benefit, but such subterfuges are idle so far as subserving the debtors' personal interest is concerned.[7] In Crouse v. Frothingham,[8] the debtor reserved the right to use and occupy a part of the premises

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[1] See Sparhawk v. Cloon, 125 Mass. 266; White v. White, 30 Vt. 338, 344; Arnwine v. Carroll, 8 N. J. Eq. 620, 625; Holdship v. Patterson, 7 Watts (Pa.) 547; Brown v. Williamson, 36 Pa. St. 338; Rife v. Geyer, 95 Pa. St. 393; Nichols v. Eaton, 91 U. S. 716, 727-729; Hyde v. Woods, 94 U. S. 523, 526; Broadway Bank v. Adams, 133 Mass. 171; Spindle v. Shreve, 9 Biss. 199; s. c. 4 Fed. Rep. 136. See §§ 39, 40.

[2] McArthur v. Hoysradt, 11 Paige (N. Y.) 495.

[3] Ellsworth v. Cook, 8 Paige (N. Y.) 643; Beamish v. Hoyt, 2 Robt. (N. Y.) 307.

[4] Tompkins v. Fonda, 4 Paige (N. Y.) 447; Payne v. Becker, 87 N. Y. 157.

[5] Sims v. Gaines, 64 Ala. 393.

[6] See Chautauque County Bank v. Risley, 19 N. Y. 369; Campbell v. Fish, 8 Daly (N. Y.) 162.

[7] Young v. Heermans, 66 N. Y. 382, and cases cited; Todd v. Monell, 19 Hun (N. Y.) 362.

[8] 27 Hun (N. Y.) 125; reversed, 97 N. Y. 105. See Elias v. Farley, 2 Abb. Ct. App. Dec. (N. Y.) 11.

conveyed for three years without rent, and it was shown that such use and occupation were worth $750. The court held that if the reservation was effectual to vest in the debtor a legal interest in the premises to the extent stated, his judgment-creditors could reach it. And if the debtor merely had a parol lease for three years, which was void by the statute of frauds, the consideration being fully paid, equity would decree a specific performance of it, and thus the debtor would have an equitable interest of some value which the creditors might reach. The court of last resort, however, reversed the decision on the insufficiency of the evidence.[1]

§ 33. **Choses in action.**—While the books and cases are full of general expressions to the effect that intangible interests fraudulently alienated by the debtor may be reclaimed by the creditor, yet the rule that choses in action can be reached by creditors and subjected to the payment of debts, has not been established without a struggle, and is not even now universal in its operation.[2] When we consider that vast fortunes may be concentrated in this species of property, it manifestly becomes of paramount importance to a creditor to know whether his process will cover it. Cases can be found holding that even equity is ordinarily powerless to require the debtor to apply choses in action in liquidation of debts,[3] but it seems to us that the better authority by far is to the effect that such interests can be reached by creditors,[4] and many cases, more or less

[1] Crouse v. Frothingham, 97 N. Y. 105.

[2] See § 17; Greene v. Keene, 14 R. I. 388.

[3] Grogan v. Cooke, 2 Ball & B. 233; Nantes v. Corrock, 9 Ves. 188; Rider v. Kidder, 10 Ves. 368; McCarthy v. Goold, 1 Ball & B. 387; Dundas v. Dutens, 1 Ves. Jr. 196; McFerran v. Jones, 2 Litt. (Ky.) 219; Green v. Tantum, 19 N. J. Eq. 105; Wallace v. Lawyer, 54 Ind. 501; Stewart v. English, 6 Ind. 176; Watkins v. Dorsett, 1 Bland's Ch. (Md.) 533. See Greene v. Keene, 14 R. I. 388.

[4] Drake v. Rice, 130 Mass. 410; Bayard v. Hoffman, 4 Johns. Ch. (N. Y.) 450; Powell v. Howell, 63 N. C. 283; Abbott v. Tenney, 18 N. H. 109; Sargent v. Salmond, 27 Me. 539; Stinson v. Williams, 35 Ga. 170; Rogers v. Jones, 1 Neb. 417; Pendleton v.

founded upon statutory provisions, upholding the creditors' right to reach this class of assets might be cited.[1] Thus creditors may reach the proceeds of a fraudulently transferred insurance policy.[2] The principle running through these cases is highly important, for under it the creditor may impound money of the debtor in the hands of a sheriff,[3] money earned but not yet due,[4] money due to heirs or distributees in the hands of personal representatives,[5] and dower before admeasurement.[6] And creditors of a corporation may sustain a bill to compel stockholders to pay their subscriptions.[7]

§ 34. **Claims for pure torts—Damages.**—The mere right of action of a judgment-debtor for a personal tort, as for assault and battery, slander, or malicious prosecution, cannot, in the nature of things, be reached by a complainant in a judgment-creditor's action.[8] Nor will a claim of this kind pass to a receiver under the usual assignment by the

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Perkins, 49 Mo. 565; Edmeston v. Lyde, 1 Paige (N. Y.) 637; Hadden v. Spader, 20 Johns. (N. Y.) 554; Ætna Nat. Bank v. Manhattan Life Ins. Co., 24 Fed. Rep. 769.

[1] City of Newark v. Funk, 15 Ohio St. 462; Bryans v. Taylor, Wright (Ohio) 245; Davis v. Sharron, 15 B. Mon. (Ky.) 64; Hitt v. Ormsbee, 14 Ill. 233; Burnes v. Cade, 10 Bush (Ky.) 251; Tantum v. Green, 21 N. J. Eq. 364. "The words 'chose in action' might be broad enough to include even actions for damages in torts, were it not that they probably have never been regarded strictly as property; nor as assignable." Ten Broeck v. Sloo, 13 How. Pr. (N. Y.) 30. See Hudson v. Plets, 11 Paige (N. Y.) 180. See § 34.

[2] Ætna Nat. Bank v. Manhattan Life Ins. Co., 24 Fed. Rep. 769.

[3] Brenan v. Burke, 6 Rich. Eq. (S. C.) 200.

[4] Thompson v. Nixon, 3 Edw. Ch. (N. Y.) 457. See Browning v. Bettis, 8 Paige (N. Y.) 568.

[5] Moores v. White, 3 Gratt. (Va.) 139; Caldwell v. Montgomery, 8 Ga. 106; Ryan v. Jones, 15 Ill. 1; Sayre v. Flournoy, 3 Ga. 541.

[6] Stewart v. McMartin, 5 Barb. (N. Y.) 438; Tompkins v. Fonda, 4 Paige (N. Y.) 448. See note to Donovan v. Finn, 14 Am. Dec. 542.

[7] Miers v. Zanesville Co., 11 Ohio 273; S. C. 13 Ohio 197; Henry v. Vermilion R.R. Co., 17 Ohio 187; Hatch v. Dana, 101 U. S. 205; Ogilvie v. Knox Ins. Co., 22 How. 380; Pierce v. Milwaukee Construction Co., 38 Wis. 253. See Marsh v. Burroughs, 1 Woods 467.

[8] Hudson v. Plets, 11 Paige (N. Y.) 183; Ten Broeck v. Sloo, 13 How. Pr. (N. Y.) 30. See Garretson v. Kane, 27 N. J. Law 211.

defendant in such a suit.[1] This rule proceeds upon the theory that such claims or rights of action are non-assignable. It must be remembered in this connection, however, that, in the case of a tort, causing an injury to the *property* of the judgment-debtor, accruing before the filing of the creditor's bill, by means of which injury certain property to which the creditor was entitled to resort for the payment of his debts has been diminished in value or destroyed, the right of action appears to be such an interest as may be properly reached and applied to the payment of the complainant's claim.[2]

§ 35. **Seats in stock exchanges.**—Counsel have contended in many cases that a membership of a stock exchange was a mere personal privilege or license, and was not property or a right to property which the creditors of the member could reach. Probably the enormous pecuniary value which not infrequently attaches to such a membership has inspired the courts to consider this so-called privilege as a species of property, the value of which the debtor should not be allowed to withhold from his creditors. It may be said to differ from the membership of a social club in that the latter has no general value or marketable quality, there being usually no provision for its transfer, and nothing remaining after the member's death. Stock exchange memberships, on the other hand, being held for purposes of pecuniary gain, may, ordinarily, be bought and sold subject to the regulations of the association, and, after the owner's death, may be disposed of and the proceeds distributed. For these reasons such interests are held to be assets.[3] In Hyde v.

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[1] Benson v. Flower, Sir W. Jones' Rep. 215; Hudson v. Plets, 11 Paige (N. Y.) 183.

[2] Hudson v. Plets, 11 Paige (N. Y.) 184. See Ten Broeck v. Sloo, 13 How. Pr. (N. Y.) 30.

[3] See Grocers' Bank v. Murphy, 60 How. Pr. (N. Y.) 426; Matter of Ketchum, 1 Fed. Rep. 840; Ritterband v. Baggett, 42 Superior Ct. (N. Y.) 556; Colby v. Peabody, 52 N. Y. Superior 394; Smith v. Barclay, 14 Chicago Leg. News 222; and compare *Ex parte* Grant, 42 L. T. [N. S.] 387; s. c.

Woods,[1] such a membership is characterized as an incorporeal right which, upon the bankruptcy of the member, passed, subject to the rules of the stock board, to an assignee. It is said, however, not to be a matter of absolute purchase or sale, but is to be taken with the incumbrances and conditions which its creators imposed upon it. Hence, a provision that debts due other members shall be first paid is valid and must be carried out. In Powell v. Waldron,[2] Finch, J., one of the most facile writers now on the bench, said: "Although of a character somewhat peculiar, its use restricted, its range of purchasers narrow, and its ownership clogged with conditions, it was nevertheless a valuable right, capable of transfer and correctly decided to be property. It was something more than a mere personal license or privilege, for it could pass from one to another of a certain class of persons and belong as fully to the assignee as it did to the assignor. That characteristic gave it not only value which might attach to a bare personal privilege, but market value which usually belongs only to things which are the subjects of sale. However it differed from the incorporeal rights earlier recognized and described, it possessed the same essential characteristics. It could be transferred from

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22 Alb. L. J. 70. *In re* Gallagher, 19 N. B. R. 224, it was decided that a license or permit to occupy certain stalls in Washington Market, New York City, was property that passed to an assignee. But *In re* Sutherland, 6 Bissell 526, on the contrary maintains that a right of membership of a board of trade does not become vested in an assignee. Compare Barry v. Kennedy, 11 Abb. Pr. N. S. (N. Y.) 421. It seems clear that the seat or license is not liable to legal proceedings on *fieri facias* or execution; Eliot v. Merchants' Exchange of St. Louis, 28 Alb. L. J. 512. In Thompson v. Adams, 93 Pa. St. 55, 66, in a *per curiam* opinion in which the learned Justice Sharswood participated, it is said: "The seat is not property in the eye of the law, it could not be seized in execution for the debts of the members." Again, it is observed in Pancoast v. Gowen, 93 Pa. St. 71: "A seat in the board of brokers is not property subject to execution in any form. It is a mere personal privilege, perhaps more accurately a license to buy and sell at the meetings of the board. It certainly could not be levied on and sold under a *fi. fa.*" There is a tendency in these cases that is to be regretted.

[1] 94 U. S. 524.

[2] 89 N. Y. 331.

hand to hand and all the time keep its inherent value, and be as freely and fully enjoyed by the permitted purchaser as by the original owner. We should make of it an anomaly, difficult to deal with and to understand, if we failed to treat it as property. The authorities which determine it to be such, seem to us better reasoned and more wisely considered than those which deny to it that character, although the subject of ownership, of use, and of sale." The cases upon this subject are fully reviewed by the St. Louis Court of Appeals, in Eliot v. Merchants' Exchange of St. Louis,[1] and the court in conclusion say: "There can be no doubt that the weight of authority is, that the seat of a member in a stock board or merchants' exchange is a species of property not subject to ordinary execution, but which may be reached by equity processes in such a way as to respect the rules of the exchange and the rights of all parties interested, and at the same time, by proceedings in aid of the execution, to compel an insolvent member to transfer his seat under the rules of the board, and apply the proceeds to the satisfaction of the debts of his judgment-creditor."

§ 36. **Trade-marks.**—It seems to be regarded as settled law that the right to use a trade-mark, in connection with the business in which it has been used, is property which will be protected by the courts, and which may be sold and transferred.[2] In Sohier v. Johnson,[3] the right to use a trade-mark was recognized as property which would pass to an assignee, as an incident under a transfer of the business and good-will.[4] The same principle may be found in the English law, and it has been held that under the bankrupt law a trade-mark passes to the assignee of the owner.[5] It

[1] 28 Alb. L. J. 512.

[2] Warren v. Warren Thread Co., 28 Alb. L. J. 278; S. C. 134 Mass. 247; Emerson v. Badger, 101 Mass. 82; Gilman v. Hunnewell, 122 Mass. 139.

[3] 111 Mass. 238.

[4] Kidd v. Johnson, 100 U. S. 617; Trade-Mark Cases, 100 U. S. 82; Warren v. Warren Thread Co., 28 Alb. L. J. 278.

[5] Leather Cloth Co. v. American Cloth Co., 11 H. L. Cas. 523; Motley v. Downman, 3 Myl. & Cr. 1; Hudson v. Osborne, 39 L. J. Ch. 79.

may be doubted whether mere personal trade-marks, the use of which, by any person other than the originator, would operate as a fraud upon the public, are subject to this rule. Where, however, the trade-marks are mere signs or symbols designating the place or the establishment at which the goods are manufactured, and not implying any peculiar skill in the originator as the manufacturer, or importing necessarily that the goods are manufactured by him, they constitute property and pass to an insolvent assignee.[1]

§ 37. **Reaching book royalties.**—An instructive case, illustrative of the nature of creditors' remedies, is Lord v. Harte.[2] The plaintiff was a judgment-creditor of Bret Harte, the well-known writer of prose and poetry, and the bill in question was filed, under the General Statutes of Massachusetts,[3] against Harte and his publishers, to reach moneys due or that might thereafter accrue to him for royalties upon books sold by the publishers. Devens, J., after observing that the defendant Harte had a valuable interest under an existing contract which could not be attached, said: "Any remedy which the plaintiffs may have by the trustee process, and no other is suggested, is uncertain, doubtful, and inadequate, and there is therefore presented a case for relief by this bill."[4]

§ 38. **Patent rights.**—The monopoly which a patent confers is considered as property;[5] the interest of the patentee

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[1] Warren v. Warren Thread Co., 134 Mass. 247. In Kidd v. Johnson, 100 U. S. 617, the court said: "When the trade-mark is affixed to articles manufactured at a particular establishment and acquires a special reputation in connection with the place of manufacture, and that establishment is transferred either by contract or operation of law to others, the right to the use of the trade-mark may be lawfully transferred with it. Its subsequent use by the person to whom the establishment is transferred is considered as only indicating that the goods to which it is affixed are manufactured at the same place and are of the same character as those to which the mark was attached by its original designer." See Trade-Mark Cases, 100 U. S. 82; Royal Baking Powder Co. v. Sherrell, 93 N. Y. 334.

[2] 118 Mass. 271.

[3] Gen. Sts. c. 113, § 2.

[4] See Stephens v. Cady, 14 How. 531.

[5] Gayler v. Wilder, 10 How. 477, per

may be assigned by operation of law in case of bankruptcy of the patentee,[1] and it may be subjected by a bill in equity to the payment of his judgment-debts.[2] Lord Alvanley, referring to the proposition that an invention was an idea or scheme in a man's head, which could not be reached by process of law, said: "But if an inventor avail himself of his knowledge and skill, and thereby acquire a beneficial interest, which may be the subject of assignment, I cannot frame to myself an argument why that interest should not pass in the same manner as any other property acquired by his personal industry."[3] And in Stephens v. Cady,[4] Justice Nelson said in relation to the incorporeal right secured by the statute to an author to multiply copies of a map by the use of a plate, that, though from its intangible character it was not the subject of seizure or sale at common law, it could be reached by a creditor's bill, and applied to the payment of the author's debts.[5] If the courts should declare patent rights exempt from appropriation it would, as suggested in Sawin v. Guild,[6] be practicable for a debtor to lock up his whole property, however ample, from the grasp of his creditors, by investing it in profitable patent rights, and thus to defeat the administration of justice.[7] We find the statement, however, that it is the patent only which gives the exclusive property, and while the right is inchoate it is

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Taney, Chief-Justice; Ager v. Murray, 105 U. S. 126; Barnes v. Morgan, 3 Hun (N. Y.) 704. See Railroad Co. v. Trimble, 10 Wall. 367.

[1] Hesse v. Stevenson, 3 Bos. & P. 565; Bloxam v. Elsee, 1 Car. & P. 558; S. C. 6 Barn. & C. 169; Mawman v. Tegg, 2 Russ. 385; Edelsten v. Vick, 11 Hare 78. But compare Ashcroft v. Walworth, 1 Holmes 152; Gordon v. Anthony, 16 Blatchf. 234; Carver v. Peck, 131 Mass. 291; Cooper v. Gunn, 4 B. Mon. (Ky.) 594. See Ager v. Murray, 105 U. S. 126.

[2] Ager v. Murray, 105 U. S. 126; Gillette v. Bate, 10 Abb. N. C. (N. Y.) 88; Gorrell v. Dickson, 26 Fed. Rep. 454. But see Greene v. Keene, 14 R. I. 388.

[3] Hesse v. Stevenson, 3 Bos. & P. 565.

[4] 14 How. 531.

[5] See Hadden v. Spader, 20 Johns. (N. Y.) 554; Gillette v. Bate, 86 N. Y. 87; Pacific Bank v. Robinson, 57 Cal. 520; Stevens v. Gladding, 17 How. 447; Massie v. Watts, 6 Cranch 148; Storm v. Waddell, 2 Sandf. Ch. (N. Y.) 494.

[6] 1 Gall. 485.

[7] See Barnes v. Morgan, 3 Hun (N. Y.) 704.

at least doubtful whether it has the characteristics of property, such as to justify a compulsory transfer by the debtor.[1]

§ 39. **Powers, when assets for creditors.**—Chief-Justice Gray, in delivering the opinion of the Supreme Judicial Court of Massachusetts,[2] said: "It was settled in the English Court of Chancery, before the middle of the last century, that where a person has a general power of appointment, either by deed or by will, and executes this power, the property appointed is deemed in equity part of his assets, and subject to the demands of his creditors in preference to the claims of his voluntary appointees or legatees. The rule perhaps had its origin in a decree of Lord Somers, affirmed by the House of Lords, in a case in which the person executing the power had in effect reserved the power to himself in granting away the estate.[3] But Lord Hardwicke repeatedly applied it to cases of the execution of a general power of appointment by will of property of which the donee had never had any ownership or control during his life; and, while recognizing the logical difficulty that the power, when executed, took effect as an appointment, not of the testator's own assets, but of the estate of the donor of the power, said that the previous cases before Lord Talbot and himself (of which very meagre and imperfect reports have come down to us) had established the doctrine, that when there was a general power of appointment, which it was absolutely in the donee's pleasure to execute or not, he might do it for any purpose whatever, and might appoint the money to be paid to his executors if he pleased, and, if he executed it voluntarily and without consideration, for the benefit of third persons, the money

[1] Gillette v. Bate, 86 N. Y. 94; Hesse v. Stevenson, 3 Bos. & P. 565. Compare Ashcroft v. Walworth, 1 Holmes 152; Campbell v. James, 18 Blatchf. 92; Prime v. Brandon Mfg. Co., 16 Blatch. 453; Clan Ranald v. Wyckoff, 41 N. Y. Superior 530; Potter v. Holland, 4 Blatchf. 206; Barnes v. Morgan, 3 Hun (N. Y.) 703.

[2] Clapp v. Ingraham, 126 Mass. 200.

[3] Thompson v. Towne, Prec. Ch. 52; s. c. 2 Vern. 319.

should be considered part of his assets, and his creditors should have the benefit of it.[1] The doctrine has been upheld to the full extent in England ever since.[2] Although the soundness of the reasons on which the doctrine rests has been impugned by Chief-Justice Gibson, *arguendo*, and doubted by Mr. Justice Story in his Commentaries, the doctrine is stated both by Judge Story and Chancellor Kent as well settled; and it has been affirmed by the highest court of New Hampshire, in a very able judgment, delivered by Chief-Justice Parker, and applied to a case in which a testator devised property in trust to pay such part of the income as the trustees should think proper to his son for life; and after the son's death, to make over the principal, with any accumulated income, to such persons as the son should by will direct.[3] A doctrine so just and equitable in its operation, clearly established by the laws of England before our Revolution, and supported by such a weight of authority, cannot be set aside by a court of chancery because of doubts of the technical soundness of the reasons on which it was originally established." Cases establishing this general rule are numerous.[4] The *jus disponendi* is to be considered as the property itself,[5] and the

[1] Townshend v. Windham, 2 Ves. Sen. 1, 9, 10; *Ex parte* Caswall, 1 Atk. 559, 560; Bainton v. Ward, 7 Ves. 503, note; s. c. cited 2 Ves. Sen. 2, and Belt's Suppl't 243; 2 Atk. 172; Pack v. Bathurst, 3 Atk. 269.

[2] Chance on Powers, c. 15, § 2; 2 Sugden on Powers (7th ed.) 27; Fleming v. Buchanan, 3 De G., M. & G. 976.

[3] Commonwealth v. Duffield, 12 Penn. St. 277, 279–281; Story's Eq. Jur. § 176, and note; 4 Kent's Com. 339, 340; Johnson v. Cushing, 15 N. H. 298.

[4] Smith v. Garey, 2 Dev. & Bat. Eq. (N. C.) 49; Mackason's Appeal, 42 Pa. St. 338; Tallmadge v. Sill, 21 Barb. (N. Y.) 51 (but compare Cutting v. Cutting, 86 N. Y. 522); 2 Chance on Powers, § 1817; Whittington v. Jennings, 6 Simons 493; Lassells v. Cornwallis, 2 Vern. 465; Bainton v. Ward, 2 Atk. 172; Pack v. Bathurst, 3 Atk. 269; Troughton v. Troughton, 3 Atk. 656; Townshend v. Windham, 2 Ves. Sen. 1; Jenney v. Andrews, 6 Madd. 264; Ashfield v. Ashfield, 2 Vern. 287; Cutting v. Cutting, 20 Hun (N. Y.) 366; revised, in part, in 86 N. Y. 522; George v. Milbanke, 9 Ves. Jr. 196; Fleming v. Buchanan, 3 De G., M. & G. 976; Palmer v. Whitmore, 2 Cr. & M. [in note] 131; Nail v. Punter, 5 Sim. 555.

[5] Holmes v. Coghill, 12 Ves. 206. See Platt v. Routh, 3 Beav. 257.

general power of disposition is in effect property.[1] In Williams v. Lomas,[2] the court said: "Jenney v. Andrews,[3] which has been followed by other authorities,[4] decides this: that where a person having a general power of appointment by will makes an appointment, the appointee is a trustee for the creditors, and the appointed fund is applicable to the payment of the debts of the donee of the power." And it has been observed that there is no reason in the nature of things why a gift or bequest of personal property, with a power of disposition, should not be measured by the same rule as a grant or devise of real estate with the same power.[5]

§ 40. **Statutory change as to powers in New York.**—The principle which we have been considering did not meet the entire favor of the revisers of the Statutes of New York, and the rule just laid down seems to have been practically

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[1] Bainton v. Ward, 2 Atk. 172. See Adams on Equity, 99, note 1. Mr. May says: "The exercise of a general power of appointment, either of land (Townshend v. Windham, 2 Ves. Sr. 1), or a sum of money (Pack v. Bathurst, 3 Atk. 269), may be fraudulent and void under the statute, but where a man has only a limited or exclusive power of appointment of course it is different. He never had any interest in the property himself which could have been available to a creditor, or by which he could have obtained credit." May on Fraud. Conv., p. 29. See Sims v. Thomas, 12 Ad. & E. 536; Hockley v. Mawbey, 1 Ves. Jr. 143, 150.

[2] 16 Beav. 3.

[3] 6 Madd. 264.

[4] 2 Sugden on Powers (6th ed.), 29; 1 Sugden on Powers (6th ed.), 123.

[5] Cutting v. Cutting, 86 N. Y. 547; s. p. Hutton v. Benkard, 92 N. Y. 295. The reservation of a power of revocation or appointment to other uses does not affect the validity of a conveyance until the power is exercised, nor does it tend to create an imputation of bad faith in the transaction. See Huguenin v. Baseley, 14 Ves. 273; Coutts v. Acworth, L. R. 8 Eq. 558; Wollaston v. Tribe, L. R. 9 Eq. 44; Everitt v. Everitt, L. R. 10 Eq. 405; Hall v. Hall, L. R. 14 Eq. 365; Phillips v. Mullings, L. R. 7 Ch. App. 244; Hall v. Hall, L. R. 8 Ch. App. 430; Toker v. Toker, 3 De G., J. & S. 487. The power is not an interest in the property which can be transferred to another, or sold on execution, or devised by will. The grantor could exercise the power either by deed or will, but he could not vest the power in any other person to be thus executed. Nor is the power a chose in action; nor does it constitute assets of a bankrupt which will vest in an assignee. Jones v. Clifton, 101 U. S. 225, per Field, J.

overturned by statute in that State.[1] The facts in Cutting v. Cutting, a case in which the statutes relating to the abolition of powers in New York were construed, was as follows: C. gave real and personal estate to her executor to collect the income during the life of her son and apply it to his use, and after his death to transfer the estate to the person the son might designate by will. The son having made the appointment, it was held that the estate was not chargeable after the son's death with a judgment obtained against him in his lifetime. It will be apparent at a glance that the result of the legislation in New York as interpreted in this case, constitutes an important innovation upon what was a settled principle of equity, and places beyond the reach of creditors property which equity considered should be subject to their remedies.[2] A policy which enables debtors to contract obligations, and defeat their payment by exercising a power of appointment in favor of a gratuitous appointee, deprives creditors of an important source of relief, and tends to establish in the debtor rights over property which the creditor cannot reach, a result to be universally deplored.

§ 41. **Gifts of small value.**—The Supreme Court of Maine[3] recognize the rule already adverted to that gifts cannot be regarded as fraudulent if, from their almost infinitesimal value, the rights of creditors would not be impaired. In French v. Holmes,[4] it appeared that the father made a gift to his child of a lamb which the ewe refused to recognize. The court observed that if the lamb had been attached it would not have sold for a sum sufficient to pay the fees of the officer making the sale, much less the costs of obtaining the judgment. If the property was exempt the gift was clearly no interference with the rights of creditors. The

[1] Cutting v. Cutting, 20 Hun (N. Y.) 367; s. c. on appeal, 86 N. Y. 537.

[2] See § 39, and cases cited.

[3] French v. Holmes, 67 Me. 193.

[4] 67 Me. 193.

court further argued: "Now could such a gift hinder, delay, or defraud creditors? The fraudulent intent is to be collected from the comparative value and magnitude of the gift. Can any one believe the existence of a fraudulent intent?" The opinion cited with approval Hopkirk v. Randolph,[1] where the gift consisted of two negro girls and a riding horse. The learned Chief-Justice Marshall in that case seemed to consider that trivial gifts, made without any view to harm creditors, and with intentions obviously fair and proper, ought to be exempted from the general rule in favor of creditors. "They do not," continued the Chief-Justice, "much differ from wedding clothes, if rather more expensive than usual, from jewels, or an instrument of music, given by a man whose circumstances justified the gift. I have never known a case in which such gifts so made have been called into question."[2]

§ 42. **Debts forgiven or cancelled.**—In Sibthorp v. Moxom,[3] it was said that where a testator gave or forgave a debt this was a testamentary act, and would not be good as against creditors.[4] And a cancellation by an insolvent of a live and subsisting asset, is a fraud upon creditors. Hence, where a debtor gave up and cancelled without payment, a note held by him against a third party, the court very promptly decided that after the debtor's decease his administrator might ignore the cancellation, and sue upon the note for the benefit of creditors.[5] Martin v. Root[6] is a pointed illustration of a different phase of this doctrine. One Larned conveyed a farm to Root and others, and furnished the grantees the means with which to remove the incumbrances upon it, the

[1] 2 Brock. 140.

[2] See Patridge v. Gopp, Amb. 596. Compare Hanby v. Logan, 1 Duv. (Ky.) 242; Garrison v. Monaghan, 33 Pa. St. 232. See §§ 15, 23, and note.

[3] 3 Atkyns 581.

[4] Compare, generally as to the effect of cancellation Martin v. Root, 17 Mass. 222, per Chief-Justice Parker; McGay v. Keilback, 14 Abb. Pr. (N. Y.) 142; Wise v. Tripp, 13 Me. 12.

[5] Tolman v. Marlborough, 3 N. H. 57.

[6] 17 Mass. 222.

conceded object of the transaction being to keep the farm out of the reach of Larned's creditors. Root gave Larned a note for $5,072.43, and at the same time took back a written promise from Larned that the note should never be collected. Larned having died insolvent, his administrator was allowed to recover on the note, and the agreement that the note should not be collected was held void in respect to creditors.

§ 43. **Enforcing promises of third parties.** — The doctrine of Lawrence v. Fox,[1] and cases embodying the general principle that where one person for a valuable consideration engages with another, by a simple contract, to do some act for the benefit of a third person, the latter, who would enjoy the benefit of the act if performed, may maintain an action for breach of the engagement,[2] has been successfully invoked in aid of creditors. Thus in Kingsbury v. Earle,[3] it appeared that a father had conveyed lands to his sons upon their orally agreeing, in consideration of the conveyance, to pay all his debts. The court held that the creditors might avail themselves of the agreement, and bring actions on the promise against the sons to recover debts, even though the amount exceeded the value of the land, and that the consideration named in the deed would not determine

[1] 20 N. Y. 268. See Prime v. Koehler, 77 N. Y. 91.

[2] Hand v. Kennedy, 83 N. Y. 154; Burr v. Beers, 24 N. Y. 178; Glen v. Hope Mutual Life Ins. Co., 56 N. Y. 381; Ricard v. Sanderson, 41 N. Y. 179; Secor v. Lord, 3 Keyes (N. Y.) 525; Thorp v. Keokuk Coal Co., 48 N. Y. 253; Campbell v. Smith, 71 N. Y. 26; Van Schaick v. Third Ave. R.R. Co., 38 N. Y. 346; Coster v. Mayor, etc., 43 N. Y. 411; Barker v. Bradley, 42 N. Y. 319; Vrooman v. Turner, 69 N. Y. 284; Garnsey v. Rogers, 47 N. Y. 236; Hall v. Marston, 17 Mass. 575; Cross v. Truesdale, 28 Ind. 44; Scott v. Gill, 19 Iowa 187; Rice v. Savery, 22 Iowa 470; Devol v. McIntosh, 23 Ind. 529; Allen v. Thomas, 3 Met. (Ky.) 198; Jordan v. White, 20 Minn. 91; Rogers v. Gosnell, 58 Mo. 590; Wiggins v. McDonald, 18 Cal. 126; Miller v. Florer, 15 Ohio St. 151; Green v. Richardson, 4 Col. 584; Bank of the Metropolis v. Guttschlick, 14 Peters 31; Bradwell v. Weeks, 1 Johns. Ch. (N. Y.) 206. Compare Ætna Nat. Bank v. Fourth Nat. Bank, 46 N. Y. 82; Bean v. Edge, 84 N. Y. 514; Simson v. Brown, 68 N. Y. 355; Belknap v. Bender, 75 N. Y. 449.

[3] 27 Hun (N. Y.) 141.

its actual value. An agreement of this character is not a promise to pay the debt of another within the statute of frauds. And where partnership assets are assigned, and as part of the consideration the purchaser agreed to pay the firm debts, any creditor may avail himself of the promise and sue the purchaser for the amount of his claim ;[1] and if, under such circumstances, a bond is taken, the creditors may get the benefit of it.[2] But the principle running through these cases is not universally recognized. It does not fully obtain in the English cases or in Massachusetts. In the latter Commonwealth, Gray, J., in the course of an opinion, said : "The general rule of law is, that a person who is not a party to a simple contract, and from whom no consideration moves, cannot sue on the contract, and consequently that a promise made by one person to another, for the benefit of a third person who is a stranger to the consideration, will not support an action by the latter."[3] It is foreign to the scope of this treatise to fully discuss in all its bearings the rule allowing third parties to enforce these promises made for their benefit. It certainly has obtained a deep foundation in our law ; its operation avoids circuity of action, reduces the expense and volume of litigation, and brings the real claimant and party beneficially interested in the controversy before the court. The arguments against its adoption, based upon common-law rules, are inequitable and technical, and lead to a harsh result.[4]

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[1] Sanders v. Clason, 13 Minn. 379 ; Barlow v. Myers, 6 T. & C. (N. Y.) 183 ; Meyer v. Lowell, 44 Mo. 328.

[2] Kimball v. Noyes, 17 Wis. 695 ; Devol v. McIntosh, 23 Ind. 529. Especially Claflin v. Ostrom, 54 N. Y. 581.

[3] Exchange Bank of St. Louis v. Rice, 107 Mass. 41.

[4] In Becker v. Torrance, 31 N. Y. 631–643, it appeared that the plaintiff had levied upon certain property of the defendant ; subsequently a receiver was appointed at the instance of another creditor. The sheriff released the levy upon receiving a promise from the receiver that the latter would sell the property and apply the proceeds upon the plaintiff's execution. The receiver realized on the sale. The plaintiff in the execution brought this action against the receiver on the parol promise made to the sheriff for plaintiff's benefit. The court decided that although the promise was not made to the plaintiff directly, it

§ 44. **Tracing the fund.**—It is a clearly established principle in equity jurisprudence that whenever a trustee has been guilty of a breach of trust, and has transferred the property by sale or otherwise to any third person, the *cestui que trust* has a full right to follow such property into the hands of the third person, unless the latter stands in the position of a *bona fide* purchaser for valuable consideration without notice; and if the trustee has invested the trust property or its proceeds in any other property into which it can be distinctly traced, the *cestui que trust* may follow it into the new investment.[1] This doctrine has been appropriated and applied to cases of property alienated in fraud of creditors; and it has been expressly held that a complaining creditor has a right to follow the fund resulting from the covinous alienation, into any property in which it was invested, so far as it can be traced.[2] But in creditors' suits the subject-matter of pursuit should be something so specific that, as to it, either in law or in equity, the plaintiff's judgment or execution, or the filing of the bill, or the appointment of a receiver, will create a lien or make a title.[3] In Gillette v. Bate,[4] the fraudulent grantee had taken stock in a corporation in exchange for the property fraudulently transferred, and it was held that creditors could reach the stock, although it had increased in value.[5]

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was available to him on the principle of Lawrence v. Fox, 20 N. Y. 268, and Burr v. Beers, 24 N. Y. 178, and that he had the right to adopt and enforce the promise instead of proceeding directly against the sheriff.

[1] Oliver v. Piatt, 3 How. 401; McLeod v. First Nat. Bk., 42 Miss. 99; Jones v. Shaddock, 41 Ala. 262; Lathrop v. Bampton, 31 Cal. 17; Story's Eq. Jur. § 1258; Mansell v. Mansell, 2 P. Wms. 679; Dewey v. Kelton, 18 N. B. R. 218; Pennell v. Deffell, 4 De G., M. & G. 372; Frith v. Cartland, 2 Hem. & M. 417, 420; *In re* Hallet's Estate, Knatchbull v. Hallet, L. R. 13 Ch. D. 696; Farmers' & Mechanics' Nat. Bk. v. King, 57 Pa. St. 202. Compare Smith v. Bowen, 35 N. Y. 83; Lyford v. Thurston, 16 N. H. 399; Barr v. Cubbage, 52 Mo. 404; Hooley v. Gieve, 9 Abb. N. C. (N. Y.) 8. See § 28. Examine especially National Bank v. Insurance Co., 104 U. S. 54.

[2] Clements v. Moore, 6 Wall. 315, 316. See Chalfont v. Grant, 1 Am. Insolv. R. 251; Marsh v. Burroughs, 1 Woods 463.

[3] Ogden v. Wood, 51 How. Pr. (N. Y.) 375. See § 28.

[4] 10 Abb. N. C. (N. Y.) 92.

[5] See Steere v. Hoagland, 50 Ill. 377. Compare Phipps v. Sedgwick, 95 U. S. 3.

§ 45. Income of trust estate.—Williams v. Thorn [1] firmly establishes the doctrine, in New York State at least, that the income of a trust fund enjoyed by the debtor beyond a sum considered necessary for his actual support, may be reached by judgment-creditors, and, like the rest of the debtor's estate, such surplus income goes to make up the trust fund for the payment of creditors. This doctrine was not established without a struggle, and debtors are constantly seeking to circumvent it.[2] The Chancellor observed in Hallett v. Thompson,[3] that it was contrary to sound policy to permit a person to have the ownership of property for his own purposes, and be able at the same time to keep it from his creditors. In Williams v. Thorn [4] the late lamented Rapallo, J., said: "By the analogy which courts of justice have always endeavored to preserve between estates or interests in land, or the income thereof, and similar interests in personal property, the right of a judgment-creditor to reach the surplus rents and profits of land, beyond what is necessary for the support and maintenance of the debtor and his family, entitles him to maintain a creditor's bill which will reach a similar interest of the debtor in the surplus income of personal property held by another for his use and benefit; but not that part of the income which may be necessary for the support of the judgment-debtor." The doctrine of Williams v. Thorn, with reference to reaching surplus trust income seems to have been acknowledged in the earlier New York cases, both as to the income of realty and personalty [5] though there is a *dictum* by Wright, J., in Campbell v. Foster,[6] denying that the income of the

[1] 70 N. Y. 270. See McEvoy v. Appleby, 27 Hun (N. Y.) 44; Tolles v. Wood, 99 N. Y. 616. Compare Spindle v. Shreve, 111 U. S. 546; Nichols v. Eaton, 91 U. S. 716; Cutting v. Cutting, 86 N. Y. 546.

[2] See Nichols v. Eaton, 91 U. S. 716; also Chap. XXIII.

[3] 5 Paige (N. Y.) 586.

[4] 70 N. Y. 273.

[5] See Rider v. Mason, 4 Sandf. Ch. (N. Y.) 351; Sillick v. Mason, 2 Barb. Ch. (N. Y.) 79; Bramhall v. Ferris, 14 N. Y. 41; Scott v. Nevius, 6 Duer (N. Y.) 672; Graff v. Bonnett, 31 N. Y. 9.

[6] 35 N. Y. 361.

cestui que trust can be diverted to creditors.[1] The confusion introduced into this branch of the law which led to the general but erroneous belief that a debtor's trust income, though fabulous in amount, was not in any form available to creditors, was partially attributable to the fact that the unsuccessful actions had been instituted by receivers in supplementary proceedings, as to whom the courts held the right to reach income did not pass until it had actually accumulated.[2] But where the judgment-creditor sues, not only the income accumulated in the trustees' hands, which may also be reached by supplementary proceedings, but the future income, above the sum found necessary for the support and use of the *cestui que trust*, may be impounded. Hann v. Van Voorhis,[3] holding that only actual accumulations in the hands of the trustees could be reached, must be regarded as overruled by Williams v. Thorn.[4] A creditor, it may be noted, may also get the benefit of an annuity given by a will in lieu of dower.[5]

§ 46. **Rule as to exempt property.**—It being a test of a fraudulent transfer that the property alienated must be of some value out of which the creditor could have realized the whole or a portion of his claim,[6] it would seem to follow logically that exempt property is not susceptible of fraudulent alienation. As the creditor possesses no right to have that class of property applied in satisfaction of his claim while the debtor owns it, and would be powerless to seize or appropriate it for that purpose were it restored to

[1] See Locke v. Mabbett, 2 Keyes (N. Y.) 457; s. c. 3 Abb. App. Dec. (N. Y.) 68.

[2] See Graff v. Bonnett, 31 N. Y. 9; Scott v. Nevius, 6 Duer (N. Y.) 672; Locke v. Mabbett, 2 Keyes (N. Y.) 457; Campbell v. Foster, 35 N. Y. 361.

[3] 15 Abb. Pr. N. S. (N. Y.) 79.

[4] 70 N. Y. 279. See, also, *infra*, Chap. XXIII. on Spendthrift Trusts; and compare Nichols v. Eaton, 91 U. S. 716; Broadway Bank v. Adams, 133 Mass. 170; Spindle v. Shreve, 9 Biss. 199; Hyde v. Woods, 94 U. S. 523, 526. Wetmore v. Truslow, 51 N. Y. 338, was not a suit to reach surplus, but the whole income, on the ground that the beneficiary was also a trustee.

[5] Degraw v. Clason, 11 Paige (N. Y.) 136.

[6] See § 23.

the debtor's possession, the legitimate deduction would seem to be that the creditor's process could not be fastened upon it in the hands of the debtor's alleged fraudulent vendee.[1] As to alienations of exempt property there may be a bad motive but no illegal act.[2] When a fraudulent transfer has been avoided, it leaves the creditor to enforce his remedy against the property in the same manner as if the fraudulent transfer had never been executed. The creditor cannot ask to be placed in a better position in respect to the property than he would have occupied if no fraudulent bill of sale had ever been made.[3] And it seems from the current of adjudications that a conveyance of lands set aside for fraud at the suit of creditors, does not estop the grantor from claiming a homestead in the premises thus conveyed. Such a conveyance does not constitute an abandonment of the homestead so as to open it to creditors.[4] Upon the same theory a general assignment is not

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[1] See Wood v. Chambers, 20 Texas 247; Foster v. McGregor, 11 Vt. 595; Whiting v. Barrett, 7 Lans. (N. Y.) 106; Bean v. Smith, 2 Mason 252; Winchester v. Gaddy, 72 N. C. 115; Legro v. Lord, 10 Me. 161; Smith v. Allen, 39 Miss. 469; Youmans v. Boomhower, 3 T. & C. (N. Y.) 21; Pike v. Miles, 23 Wis. 164; Dreutzer v. Bell, 11 Wis. 114; Smillie v. Quinn, 90 N. Y. 493; Robb v. Brewer, 15 Reporter 648; Premo v. Hewitt, 55 Vt. 363.

[2] O'Conner v. Ward, 60 Miss. 1037. "To property so exempted the creditor has no right to look, and does not look, as a means of payment when his debt is created; and while this court has steadily held, under the constitutional provision against impairing the obligations of contracts by State laws, that such exemption laws, when first enacted, were invalid as to debts then in existence, it has always held, that, as to contracts made thereafter, the exemptions were valid." Nichols v. Eaton, 91 U. S. 726.

[3] Sheldon v. Weeks, 7 N. Y. Leg. Obs. 60.

[4] Turner v. Vaughan, 33 Ark. 460; Thompson on Homesteads, § 408, etc., and cases cited. "It is evident," says Mr. Freeman, "that creditors cannot be defrauded, hindered, or delayed by the transfer of property which, neither at law nor in equity, can be made to contribute to the satisfaction of their debts. Hence it is almost universally conceded that property which is, by statute, exempt from execution, cannot be reached by creditors on the ground that it has been fraudulently transferred." Freeman on Executions, § 138. "Fraud against creditors is not predicable of the conveyance of property thus exempt; and so the title to it is not impeachable by creditors of the debtor making such conveyance." Prout v. Vaughn, 52 Vt. 459.

invalidated by a clause which reserves all exempt property;[1] nothing is withheld which the creditors are entitled to have included in the trust; and in New York a receiver of a judgment-debtor gets no title to exemptions.[2] The exemption is said, however, to endure only during the lifetime of the party, and consequently a gift of exempt personalty, intended to take effect upon the death of the donor, and made with the object of defrauding creditors, cannot be sustained.[3]

§ 47. **Fraudulent purchasers of exempt property.**—In conformity with the general rule that exempt property is not usually susceptible of fraudulent alienation as regards creditors,[4] the courts have decided that there is no intelligible ground upon which it can be held to be fraudulent for a

[1] Richardson v. Marqueze, 59 Miss. 80; S. C. 42 Am. Rep. 353; Hildebrand v. Bowman, 100 Pa. St. 580. See Smith v. Mitchell, 12 Mich. 180; Mulford v. Shirk, 26 Pa. St. 473; Heckman v. Messinger, 49 Pa. St. 465. *Contra*, Sugg v. Tillman, 2 Swan (Tenn.) 208.

[2] Finnin v. Malloy, 33 N. Y. Super. Ct. 382; Cooney v. Cooney, 65 Barb. (N. Y.) 524.

[3] Martin v. Crosby, 11 Lea (Tenn.) 198. In Tollotson v. Wolcott, 48 N. Y. 190, it appeared that the debtor had recovered a judgment against a creditor for an unlawful levy upon and sale of the debtor's exempt property. A creditor sought to get the benefit of this judgment on the ground that the character of the property had been changed. The court said: "It would be useless to grant the privilege contained in the statute if it could be rendered of no effect by refusing an adequate remedy for the invasion of the exemption; or by permitting a recovery, when obtained for such invasion, to be wrested from the debtor by proceedings on behalf of his creditors. The judgment, when recovered by the debtor for the wrongful invasion of his privilege of the exemption of his property from levy and sale, represents the property for the value of which it was recovered. He may make another investment of the money to be recovered in the same description of property, in the possession of which, as a householder, or person providing for the support of his family, the statute will again protect him. . . . . The proceeds of the judgment should be held to be protected under the statute, as exempt property, until sufficient time has elapsed to afford the debtor a reasonable opportunity to again purchase the description of property necessary to enable him to support his family, and in the possession of which the law will protect him as against the claims of creditors." See Andrews v. Rowan, 28 How. Pr. (N. Y.) 126.

[4] Boggs v. Thompson, 13 Neb. 403. Derby v. Weyrich, 8 Neb. 174; Crummen v. Bennet, 68 N. C. 494. See § 46.

person whose property does not, in the aggregate, exceed the value of all the exemptions, but a portion of which property is in a form not exempt, to convert or exchange it into the particular kinds of property which are exempt. Thus in O'Donnell v. Segar,[1] the court argued: "The only fraud claimed to have existed in reference to the oxen, was that he might fraudulently have acquired them from the proceeds or exchange of other property which was not exempt, and this with the intent to defeat the claims of creditors. This, in my opinion, if true, does not constitute legal fraud, so long as he was, *in fact*, engaged in one of the occupations mentioned, ... in which the use of the cattle was needed." In Randall v. Buffington,[2] the court decided that a general creditor of an insolvent debtor could not subject a homestead to liability for his debts notwithstanding the insolvent had applied property in his hands to the payment of a debt which was a lien on the homestead.[3] "It must be remembered," said Chief-Justice Breese, "that it is not a fraud on creditors to buy a homestead which would be beyond their reach."[4] This would seem to afford a debtor an opportunity to practice a species of petty fraud upon his creditors, but, as exemptions of property from execution are usually very limited in amount,[5] and the policy of the law is to prevent the creditor from absolutely stripping the debtor of every vestige of property, and of all the necessary conveniences of living, or means of gaining a subsistence, the result is not to be deprecated. Manifestly the creditor should not be favored to the extent of absolutely crippling and pauperizing the debtor,[6] or rendering him a public charge.

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[1] 25 Mich. 377.

[2] 10 Cal. 493.

[3] See *In re* Henkel, 2 Sawyer 308.

[4] Cipperly v. Rhodes, 53 Ill. 350.

[5] See Nichols v. Eaton, 91 U. S. 726.

[6] See Hixon v. George, 18 Kansas 253. "The debtor, by securing a homestead for himself and family, whether by an arrangement with creditors who might levy on it, or by the purchase of a house, or by moving into a house which he already owns, takes nothing from his creditors which the law has secured to them, or in which they have

§ 48. Covinous alienations of exemptions.—A conveyance of homestead by an embarrassed debtor and his wife to a third party, and by the third party to the wife, cannot be set aside as fraudulent and void as to creditors, for the homestead is out of their reach,[1] and in general a voluntary conveyance of property exempt from execution vests a good title in the donee, as against the creditors of the donor.[2] The creditor, as we have said, cannot be injured or defrauded by the transfer of property which is, by positive law, expressly exempt from seizure to satisfy their debts.[3]

§ 49. Conflicting cases. — The cases are not, however, uniform in this regard, and are in some instances disinclined to allow a debtor to turn what was intended as a shield of poverty into an instrument of fraud;[4] and there are decisions of at least local authority which deny the benefit of the exemption laws to a dishonest debtor who shuffles and conceals his property,[5] or executes a homestead deed in furtherance of a design to hinder, delay, and defraud creditors in the recovery of their just debts.[6] And it

any vested right. He conceals no property. He merely puts his property into a shape in which it will be the subject of a beneficial provision for himself which the law recognizes and allows." Hoar, J., in Tucker v. Drake, 11 Allen (Mass.) 146.

[1] Morrison v. Abbott, 27 Minn. 116. See Ferguson v. Kumler, 27 Minn. 156; Baldwin v. Rogers, 28 Minn. 544; McFarland v. Goodman, 6 Biss. 111; Vogler v. Montgomery, 54 Mo. 578; Cox v. Wilder, 2 Dillon 46; White v. Givens, 29 La. Ann. 571; Muller v. Inderreiden, 79 Ill. 382; Hugunin v. Dewey, 20 Iowa 368; Buckley v. Wheeler, 52 Mich. 1; Schribar v. Platt, 19 Neb. 631.

[2] Furman v. Tenny, 28 Minn. 77; Duvall v. Rollins, 68 N. C. 220; Moseley v. Anderson, 40 Miss. 49; Anthony v. Wade, 1 Bush (Ky.) 110; Patten v. Smith, 4 Conn. 450; Tracy v. Cover, 28 Ohio St. 61. See § 46.

[3] Morrison v. Abbott, 27 Minn. 116; Carhart v. Harshaw, 45 Wis. 340; s. c. 30 Am. Rep. 752, and notes; Delashmut v. Trau, 44 Iowa 613; Smith v. Rumsey, 33 Mich. 183; Derby v. Weyrich, 8 Neb. 174; Megehe v. Draper, 21 Mo. 510; Washburn v. Goodheart, 88 Ill. 229; Hixon v. George, 18 Kans. 253; O'Conner v. Ward, 60 Miss. 1036.

[4] Brackett v. Watkins, 21 Wendell (N. Y.) 68.

[5] Strouse's Ex'r v. Becker, 38 Pa. St. 192.

[6] See Rose v. Sharpless, 33 Gratt. (Va.) 156. See generally Smith v. Emerson, 43 Pa. St. 456; Gilleland v. Rhoads, 34 Pa. St. 187; Diffenderfer v. Fisher, 3 Grant's Cases (Pa.) 30; Piper

has been held that the privileges of the homestead act may be forfeited by fraud;[1] and the right to claim exemption also forfeited and lost.[2] This does not, it seems to us, vary the general principle already stated, for in these latter cases the property is not considered to be under the cover or protection of the exemption statutes, and by the rule of construction just stated, is liable to the claims of creditors much the same as though it had never been even colorably embraced within the exemptions.

§ 50. **Abandoned exemptions.**—It is asserted in Crosby v. Baker,[3] that if the debtor changes his purpose to use the exempt articles in his business, and determines to and does in fact sell them to a third person, such bargain being made to defraud creditors, and this purpose being participated in by the vendee, the conveyance gives no title to the purchaser, and the property may be reclaimed and held by the assignee of the insolvent debtor in an action against the purchaser.[4] The change of intention, it is argued, takes away one of the requisites for the exemption of the property. The same principle applies to abandoned homesteads.[5]

§ 50*a*. **What cannot be reached.**—While the property or accumulations of a debtor belong to his creditors, this is not true of his talents or industry. Said Hunt, C.:[6] "The application of the debtor's property is rigidly directed to the payment of his debts. He cannot transport it to another country, transfer it to his friend, or conceal it from his creditor. Any or all of these things he may do with

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v. Johnston, 12 Minn. 67; Chambers v. Sallie, 29 Ark. 407; Huey's Appeal, 29 Pa. St. 219; Currier v. Sutherland, 54 N. H. 475; s. c. 20 Am. Rep. 143, and note.

[1] Pratt v. Burr, 5 Biss. 36.

[2] Cook v. Scott, 6 Ill. 335; Cassell v. Williams, 12 Ill. 387; Freeman v. Smith, 30 Pa. St. 264; Larkin v. McAnnally, 5 Phila. (Pa.) 17; Carl v. Smith, 8 Phila. (Pa.) 569.

[3] 6 Allen (Mass.) 295.

[4] See Stevenson v. White, 5 Allen (Mass.) 148.

[5] Cox v. Shropshire, 25 Texas 113.

[6] Abbey v. Deyo, 44 N. Y. 347.

his industry. He is at liberty to transfer his person to a foreign land. He may bury his talent in the earth, or he may give it to his wife or friend. No law, ancient or modern, of which I am aware, has ever held to the contrary." [1]

[1] Compare Lynn v. Smith, 35 Hun (N. Y.) 275; Ross v. Hardin, 79 N. Y. 90, 91; Gage v. Dauchy, 34 N. Y. 293; Gillett v. Bate, 86 N. Y. 94.

CHAPTER III.

CREDITORS' REMEDIES.

§ 51. Concurrent remedies—Legal and equitable.
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54. Joinder of claims.
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§ 51. **Concurrent remedies—Legal and equitable.**—Equity has concurrent jurisdiction with law over frauds under the statute 13 Eliz. c. 5, or similar enactments,[1] and the same general rules of construction govern in both courts.[2] Thus it was remarked by the Supreme Court of New Jersey: "Courts of law and courts of equity have concurrent jurisdiction over frauds, under the statute concerning fraudulent conveyances. In cases where the legal title to the property is such that it cannot be seized under execution, resort to equity is necessary—as where the legal title has never been in the debtor, having been conveyed by a third person directly to another, in secret trust for the benefit of the debtor, with a design fraudulently to screen it from his creditors.[3] But where the legal title has been in the debtor,

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[1] Orendorf v. Budlong, 12 Fed. Rep. 24.

[2] Sexton v. Wheaton, 1 Am. Lea. Cas. (5th ed.) 58, 59, note; Hopkirk v. Randolph, 2 Brock. 133. See § 4.

[3] See § 57.

so as to be subject to execution at law, and might be made available for the satisfaction of the debt, if the fraudulent conveyance had not been interposed, the creditor, or a third person having taken title under a sheriff's sale, may bring ejectment, and avoid the fraudulent conveyance by proof of the illegal purpose for which it was made."[1] It will be presently seen that this latter illustration is not of universal application.[2] The forms of relief available to creditors are outlined in our opening chapter,[3] where it is shown that creditors may invoke the aid of equity in two cases, after proceeding to judgment and execution at law without obtaining satisfaction of the debt.[4] In the first class of cases the complainant proceeds simply upon the ground of fraud, and in support or furtherance of the remedy at law, while in the other class of cases relief is sought upon the theory that the remedy at law has been exhausted, and that it is inequitable and unjust on the part of the debtor to refuse to apply any intangible property or choses in action toward the payment of the judgment.[5] Resort by creditors to courts of equity is of very frequent occurrence because the common law is not sufficiently flexible. Of necessity, in a common-law action a purchase is treated as either valid or void.[6] There is no middle ground.[7] Proof of absolute fraud, which is usually difficult, is for that reason generally required at law, while in equity it is said that an unfair or inequitable transaction—one not of necessity absolutely fraudulent in the full sense of that term—may be unravelled in the interest of creditors. In such cases the rights of an innocent vendee can be preserved and protected by

[1] Mulford v. Peterson, 35 N. J. Law 133.

[2] See § 69.

[3] See § 4.

[4] Williams v. Hubbard, Walker's Ch. (Mich.) 28; Cornell v. Radway, 22 Wis. 264; Beck v. Burdett, 1 Paige (N. Y.) 305; Jones v. Green, 1 Wall 331.

[5] Williams v. Hubbard, Walker's Ch. (Mich.) 29.

[6] See *infra*, Void and Voidable Acts. Also Chap. XIII.

[7] See § 193, Foster v. Foster, 56 Vt. 540.

the plastic hand of equity. In other words, certain cases seem to imply that proof of fraud need not be so complete in equity as at law;[1] but it is not so easy to illustrate the distinction or to state a substantial justification for its existence.[2] Mr. Abbott observes in an editorial in the New York *Daily Register*:[3] "In the quaint language of Westminster Hall, 'legal fraud' means illegal fraud, that is to say, fraud for which an action at law lay to recover damages. So 'equitable fraud' means inequitable conduct not illegal in the sense of sustaining an action for damages, but yet so like it in effect that the Chancellor would give a remedy."

Though in some States legal and equitable jurisdictions have been united in the same tribunals, yet the distinctions which formerly appertained in the forms of action, of pleading, and of relief, are by no means superseded or obliterated. In territory where the system of common law and chancery both prevail, and the only adequate relief is in equity, and the pleadings are framed in accordance with this view, the suit must be tried as a chancery case by the modes of procedure known to courts of equity. The judge or chancellor is responsible for the decision, and, though he may, by means of feigned issues, refer any questions of fact to a jury,[4] still his own conscience must be satisfied that the finding is correct, and the decree must be rendered as the result of his individual judgment, aided, it may be true, by the finding of the jury. Hence, where the trial in such a case is conducted as though it were a controversy in a common-law action, and a judgment is rendered upon a verdict as at common law, it will be reversed for error.[5] And in

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[1] Warner v. Daniels, 1 Woodb. & M. 103; Fullagar v. Clark, 18 Ves. 483; Earl of Chesterfield v. Janssen, 2 Ves. Sen. 143.

[2] See Marksbury v. Taylor, 10 Bush (Ky.) 519.

[3] Nov. 15, 1888.

[4] See Wright v. Nostrand, 94 N. Y. 31; Colman v. Dixon, 50 N. Y. 572.

[5] Dunphy v. Kleinsmith, 11 Wall. 615.

an equitable proceeding of this character, as will presently be shown, a decree in the nature of a judgment for damages cannot be rendered against the defendant who is alleged to have fraudulently taken an assignment of the insolvent's property. The decree must be for an accounting as to the property which has come into the hands of the fraudulent vendee.[1] Where property which is legally liable to be taken in execution has been fraudulently conveyed or encumbered, the jurisdiction is usually concurrent, as the creditor may either issue an execution at law and sell the property, or file a bill in equity to have the conveyance set aside.[2] The remedy in equity, as will presently appear,[3] is necessarily exclusive in cases where the subject-matter of contention is not subject to execution.

§ 52. **No injunction against debtor before judgment.**—As a general rule, a simple contract creditor who has no lien on the property, cannot enjoin his debtor from selling it, nor will he be allowed to come into equity to invoke its interference to preserve the property until a judgment can be obtained.[4] If the property of an honest struggling debtor could be tied up by injunction upon mere unadjusted legal demands, he might be constantly exposed to the greatest hardships and grossest frauds, for which the law would

[1] See §§ 176–179.

[2] See note to Sexton v. Wheaton, 1 Am. Lea. Cas. (5th ed.) 58, 59; Bispham's Equity, § 242; Blenkinsopp v. Blenkinsopp, 1 De G., M. & G. 500; Partee v. Mathews, 53 Miss. 146; Sheafe v. Sheafe, 49 N. H. 516; Scott v. Indianapolis Wagon Works, 48 Ind. 75; Gallman v. Perrie, 47 Miss. 131, 140; Barto's Appeal, 55 Pa. St. 386; Tupper v. Thompson, 26 Minn. 386; Henry v. Hinman, 25 Minn. 199.

[3] See § 56.

[4] Peyton v. Lamar, 42 Ga. 134; Cubbedge v. Adams, 42 Ga. 124; Oberholser v. Greenfield, 47 Ga. 530; Shufeldt v. Boehm, 96 Ill. 560; Moran v. Dawes, 1 Hopk. Ch. (N. Y.) 365; Dortic v. Dugas, 52 Ga. 231; Buchanan v. Marsh, 17 Iowa 494; Rich v. Levy, 16 Md. 74; Phelps v. Foster, 18 Ill. 309; Brooks v. Stone, 19 How. Pr. (N. Y.) 395; Uhl v. Dillon, 10 Md. 500; Hubbard v. Hubbard, 14 Md. 356. Compare Case v. Beauregard, 99 U. S. 125; Locke v. Lewis, 124 Mass. 1. See § 73. Nor can a creditor having possession of the debtor's property, without judicial process and against the debtor's will, sell the property and apply its proceeds to the payment of the debt. Xenia Bank v. Stewart, 114 U. S. 224.

afford no adequate remedy. It would deprive him of the means of payment, or of defending himself against vexatious litigation, and force him into unconscionable compromises to prevent the ruin of his business pending the controversy.[1] An injunction ought not to issue to compel parties to hold goods pending a trial at law with the expectation that they may be wanted to answer an execution upon a judgment which the creditor hopes to obtain.[2] "The authorities are clear," says the learned and lamented Mr. Justice Campbell,[3] "that chancery will not interfere to prevent an insolvent from alienating his property to avoid an existing or prospective debt, even when there is a suit pending to establish it." "The reason of the rule," says Chancellor Kent, "seems to be that until the creditor has established his title he has no right to interfere, and it would lead to an unnecessary and, perhaps, a fruitless and oppressive interruption of the exercise of the debtor's rights. Unless he has a certain claim upon the property of the debtor, he has no concern with his frauds."[4] So the sim-

[1] Shufeldt v. Boehm, 96 Ill. 560.

[2] Phelps v. Foster, 18 Ill. 309; Heacock v. Durand, 42 Ill. 230; Horner v. Zimmerman, 45 Ill. 14.

[3] Adler v. Fenton, 24 How. 411.

[4] Wiggins v. Armstrong, 2 Johns. Ch. (N. Y.) 145, and the able opinion of Chancellor Kent. Uhl v. Dillon, 10 Md. 500, was a bill for an injunction and receiver filed by a simple contract creditor, charging that the defendant was deeply in debt; that he was disposing of his stock; had already parted with his real estate; and was collecting debts due to him, with the intention to defraud creditors and abscond. An injunction was allowed and a receiver appointed. The appellate court in reversing the decree and dismissing the bill, said (p. 503): "The bill filed by the appellees in this cause, states no sufficient case entitling them to the relief prayed. No authority has been shown to this court, nor can any be produced entitled to consideration, which sanctions the exercise of the high and extraordinary power of a court of chancery, to interpose, by writ of injunction, in a case like the one before us, restraining a debtor in the enjoyment and power of disposition of his property. The appellees (the complainants below) are merely general creditors of the appellant, who have not prosecuted their claim to judgment and execution, nor in any other manner acquired a lien upon the debtor's property, and were not entitled to the writ of injunction nor to the appointment of a receiver. Whatever may be the supposed defects of the existing laws of the State, in leaving to the debtor the absolute power of disposing of his property, and leaving the creditor to the slow and

ple contract creditors of a firm ordinarily have no specific lien upon the firm property which will enable them to interfere with any disposition which the firm may make of it.[1]

§ 53. **Certain exceptional cases.**—Occasional exceptions may be found in some States to the rule that equity will not interfere at the instance of a simple contract creditor. But the exceptions prove the force of the rule. In Moore v. Kidder,[2] the bill distinctly charged a fraudulent intention on the part of a debtor summoned as trustee, and an attempt to dispose of his property, and put it beyond the reach of creditors, for the purpose of defeating the plaintiffs in the collection of any judgment that might be obtained in a suit at law, and asked for an injunction to prevent that mischief and wrong. The court said that the bill very clearly showed a case for equitable interference, in aid of the remedy at law, and that without such relief the suit at law would be rendered fruitless by the active fraud of the defendant.[3] Clearly this was a proper case for the issuance of an attachment or other suitable provisional relief in the action at law. In another case where a bill charged insolvency in the debtor, and averred that he had fraudulently transferred his goods to a third person, who was implicated in the fraud, and that the debtor had purchased the goods with intent to defraud the plaintiffs, a receivership

very inadequate legal remedies now provided, if such defects exist, it is solely in the power of the legislature to correct them. It is not within the province of the chancery courts to stretch their power beyond the limits of the authorities of the law, for the purpose of remedying such defects. Such a course would be productive of great mischief, and make the rights of the citizen depend upon the vague and uncertain discretion of the judges, instead of the safe and well-defined rules of law."

[1] Wilcox v. Kellogg, 11 Ohio 394; Gwin v. Selby, 5 Ohio St. 97; Sigler v. Knox County Bank, 8 Ohio St. 511; Potts v. Blackwell, 4 Jones' Eq. (N. C.) 58; Field v. Chapman, 15 Abb. Pr. (N. Y.) 434; State v. Thomas, 7 Mo. App. 205; Shackelford v. Shackelford, 32 Gratt. (Va.) 481; Allen v. Center Valley Co., 21 Conn. 130; Schmidlapp v. Currie, 55 Miss. 597; Reeves v. Ayers, 38 Ill. 418; Mayer v. Clark, 40 Ala. 259. See Case v. Beauregard, 99 U. S. 125.

[2] 55 N. H. 491.

[3] Compare Bowen v. Hoskins, 45 Miss. 183; Cottrell v. Moody, 12 B. Mon. (Ky.) 502; Thompson v. Diffenderfer, 1 Md. Ch. 489.

was allowed before judgment.[1] Here the relief was extended upon the theory that the goods for which the indebtedness was created were fraudulently obtained, and that the debtor never acquired title to them. This would seem to be substantially substituting a bill in equity for the relief usually incident to replevin. These cases can scarcely be commended as safe precedents.

§ 54. **Joinder of claims.**—The assets of the fraudulent debtor are, as a rule, scattered among different friends, in different forms, and by transactions had at different times. This requires us to notice the authorities as to uniting or joining claims. In cases where the sole object of the bill is to secure satisfaction of a judgment out of property fraudulently alienated, the suit may be framed to avoid several distinct conveyances made to as many grantees. Such a bill is said to embody a single cause of action.[2] This principle applies although the defendants may have separate and distinct defenses.[3] In Lattin v. McCarty,[4] it was decided that an equitable cause of action to cancel and remove, as a cloud upon plaintiff's title, a deed given by mistake by a third party to the defendant, under which the latter had fraudulently obtained possession, could be united with a claim to recover possession of the premises, and asserted in the same complaint. The principle of this case was expressly repudiated in Missouri in an action involving substantially the same state of facts, on the theory that a bill in equity was not a proper form of action for the recovery of the possession of real estate, there being an adequate remedy at law.[5] But this latter reason does not commend

[1] Cohen v. Meyers, 42 Ga. 46. Compare Hyde v. Ellery, 18 Md. 500; Rosenberg v. Moore, 11 Md. 376; Haggarty v. Pittman, 1 Paige (N. Y.) 298.

[2] Trego v. Skinner, 42 Md. 432; North v. Bradway, 9 Minn. 183; Chase v. Searles, 45 N. H. 511; Jacot v. Boyle, 18 How. Pr. (N. Y.) 106; Tucker v. Tucker, 29 Mo. 350; Snodgrass v. Andrews, 30 Miss. 472; Reed v. Stryker, 4 Abb. App. Dec. (N. Y.) 26; Dimmock v. Bixby, 20 Pick. (Mass.) 368.

[3] Donovan v. Dunning, 69 Mo. 436.

[4] 41 N. Y. 107.

[5] Peyton v. Rose, 41 Mo. 257; Curd v. Lackland, 43 Mo. 140.

itself as conclusive. Fraudulent confessions of judgments entered in different courts may be attacked in one suit.[1] So a partner may sue his copartners for an accounting, and may join in the same action alienees of his copartners, to whom the latter have collusively transferred partnership assets in fraud of the partnership, and seek a cancellation of the transfer as well as an accounting. "Why," it has been said, "should not all this be embraced in one action? The object is single, viz.: To bring about a complete and final settlement of the partnership."[2]

§ 55. **Uniting causes of action.**—Questions relating to the joinder of causes of action of necessity frequently arise for adjudication in contests of the class under consideration, where debtors have sought to conceal property by different subterfuges. In Palen v. Bushnell,[3] the plaintiff, as receiver in supplementary proceedings, instituted an action against the debtor and a third party, (1). To recover moneys usuriously exacted by the third party from the debtor; (2). To compel the third party to account for securities belonging to the debtor; and (3). To set aside as fraudulent certain transfers of real and personal property alleged to have been made by the debtor to the third party. The court observed: "What is the subject of the action in this case? It is the restitution of the property of the judgment-debtor whom the plaintiff represents. To entitle himself to this relief, the plaintiff avers in his complaint different transactions out of which his right to restitution flows." This statement is criticised by Mr. Pomeroy,[4] as follows: "There is here a plain confusion of ideas. The restitution of the

[1] Uhlfelder v. Levy, 9 Cal. 607.

[2] Compare, upon this general subject, Webb v. Helion, 3 Rob. (N. Y.) 625; Wade v. Rusher, 4 Bosw. (N. Y.) 537. A judgment-creditor of an insolvent railroad corporation may in Ohio join in the same action a claim to compel payment of unpaid subscriptions and a claim to enforce the individual liability of stockholders. Warner v. Callender, 20 Ohio St. 190.

[3] 46 Barb. (N. Y.) 25.

[4] Remedies and Remedial Rights, § 470.

debtor's property, which is the relief demanded, is the *object* of the action. If there is anything connected with this matter clear, it is that the authors of the code used the terms 'subject of action' and 'object of the action' to describe different and distinct facts." The criticism upon the particular language employed in this case is probably just, but we cannot suppress the conviction that a system of procedure which prohibited the joinder of such claims in a single action would furnish most unsatisfactory and inadequate redress to creditors.

§ 56. **Exclusive jurisdiction in equity.**—Manifestly in cases where property is of such nature that it never was subject to execution at law, the remedy of creditors desiring to reach it, as we have observed, is exclusively in chancery.[1] Thus, as has already been shown,[2] it was observed by Chief-Justice Gray, in delivering the opinion of the Supreme Court of Massachusetts, in Drake v. Rice,[3] that, "by the law of England before the American Revolution, ... fraudulent conveyances of choses in action, though not specified in the statute, were equally void, but from the nature of the subject, the remedy of the creditor must be sought in equity."[4]

§ 57. **Land purchased in name of third party.**—The creditor may encounter a practical difficulty in reaching realty paid for by the debtor the title to which is fraudulently taken in the name of a third party. This is a very common device. The courts are somewhat at variance upon the question as to whether or not real estate so held can be sold on execu-

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[1] See Weed v. Pierce, 9 Cow. (N. Y.) 722; Sexton v. Wheaton, 1 Am. Lea. Cas. (5th ed.) 59; Drake v. Rice, 130 Mass. 412; Abbott v. Tenney, 18 N. H. 109; Sargent v. Salmond, 27 Me. 539.

[2] See § 17.

[3] 130 Mass. 412.

[4] Citing Taylor v. Jones (1743), 2 Atk. 600; King v. Dupine (1744), 2 Atk. 603, note; Horn v. Horn (1749), Ambl. 79; Ryall v. Rolle (1749), 1 Atk. 165; S. C. 1 Ves. Sr. 348; Partridge v. Gopp (1758), 1 Eden 163; S. C. Ambl. 596; Bayard v. Hoffman, 4 Johns. Ch. (N. Y.) 450; Hadden v. Spader, 20 Johns. (N. Y.) 554; Abbott v. Tenney, 18 N. H. 109; Sargent v. Salmond, 27 Me. 539. See §§ 17, 33.

tion against the debtor, and recovered by the purchaser in ejectment, or in fact, whether it can be reached by any proceedings at law. Authorities can be cited to the effect that an execution sale of land, the title to which is held in this manner, passes nothing to the purchaser;[1] the creditor's proper remedy to reach it is declared to be by bill in equity;[2] the grantee is considered to hold the title impressed with a trust in favor of creditors,[3] and may be compelled to quitclaim his interest.[4] The principle embodied in these authorities seems to commend itself as logical, but it is not universally recognized. There are cases holding that an execution purchaser on a judgment against the debtor may recover the lands in ejectment, even though the title was never in the debtor, if it is shown that the fraudulent grantee held it for the debtor's benefit,[5] and that such an interest may be attached.[6] It may be observed that a purchase of personal property by a debtor in the name of

[1] Mulford v. Peterson, 35 N. J. Law 133; Haggerty v. Nixon, 26 N. J. Eq. 42; Garfield v. Hatmaker, 15 N. Y. 475; Dewey v. Long, 25 Vt. 564; Davis v. McKinney, 5 Ala. 719; Webster v. Folsom, 58 Me. 230; Low v. Marco, 53 Me. 45; Jimmerson v. Duncan, 3 Jones (N. C.) Law 537; Carlisle v. Tindall, 49 Miss. 229; Howe v. Bishop, 3 Met. (Mass.) 26. See Hamilton v. Cone, 99 Mass. 478. In Niver v. Crane, 98 N. Y. 40, it was decided that the fact that a debtor paid the consideration for property conveyed to another did not alone authorize a judgment taking the property to satisfy the debt. Under the provision of the statute of uses and trusts (1 R. S. 728, §§ 51, 52), which declares that a grant made to one person, the consideration for which is paid by another, shall be presumed fraudulent as against the creditors at that time of the person paying the consideration, and where fraudulent intent is not disproved, a trust shall result in favor of such creditors, to make out such a trust the consideration must be paid at or before the execution of the conveyance. See Decker v. Decker, 108 N. Y. 128.

[2] Mulford v. Peterson, 35 N. J. Law 133.

[3] Garfield v. Hatmaker, 15 N. Y. 475; Corey v. Greene, 51 Me. 114; Simmons v. Ingram, 60 Miss. 900.

[4] Cutter v. Griswold, Walker's Ch. (Mich.) 437. Must the creditor first recover judgment in such a case? See Ocean Nat. Bank v. Olcott, 46 N. Y. 22. See *infra*, Chap. IV.

[5] Kimmel v. McRight, 2 Pa. St. 38; Tevis v. Doe, 3 Ind. 129; Pennington v. Clifton, 11 Ind. 162; Guthrie v. Gardner, 19 Wend. (N. Y.) 414. Compare Wait v. Day, 4 Den. (N. Y.) 439; Brewster v. Power, 10 Paige (N. Y.) 569; Garfield v. Hatmaker, 15 N. Y. 477.

[6] Cecil Bank v. Snively, 23 Md. 253.

a third party does not exempt it from direct seizure by creditors.[1]

§ 58. **Relief before and after sale.**—The jurisdiction of a court of equity is ample either before or after sale under a judgment, to set aside a deed made in fraud of creditors—before sale to enable the creditor to present and sell an unembarrassed title; after sale to remove clouds from the title.[2] It will thus be seen how important the jurisdiction of equity becomes in connection with fraudulent transfers. It would often be impossible, especially in cases affecting realty, to render the title marketable until the flexible hand of a court of equity had removed the simulated transfers and incumbrances in which the debtor has involved it. Equity alone can disentangle the title from the doubts and embarrassments which interfere with a realization of a fair price; and to that extent and for that purpose its invaluable assistance is usually asked.[3] In Rhead v. Hounson,[4] the court said: "The bill must be construed in reference to its nature. It is not filed to reach property incapable of seizure on execution, and therefore based on the theory that the legal remedy has been exhausted. Very far from it. The principle on which it proceeds is that a legal remedy is in fact progressing, and which, being fraudulently obstructed, the aid of the court is needed to remove that obstruction. The claim made is that the deed from the judgment-debtor to his son is fraudulent as against the creditor, and that the farm is therefore subject to levy and the deed exposed to be removed out of the way of it by the assistant jurisdiction of equity."

§ 59. **The remedy at law.** — A judgment-creditor may proceed at law to sell under execution lands or property

[1] Godding v. Brackett, 34 Me. 27. See § 82.

[2] Gallman v. Perrie, 47 Miss. 131. See Orendorf v. Budlong, 12 Fed. Rep. 25.

[3] Partee v. Mathews, 53 Miss. 146.

[4] 46 Mich. 246.

which his debtor has fraudulently alienated,[1] which are subject to execution. The attempted transfer may be treated as a nullity, and the property subjected to seizure and sale upon execution the same as though no such covinous transfer had ever been made.[2] The creditor in such cases may consider the debtor as still the owner of the property, and may pursue it to secure satisfaction of the claim the same as though the title were unembarrassed by the fraudulent deed or transfer.[3] This general principle was involved in Rinchey v. Stryker,[4] in which case it was decided that where an attachment was issued to a sheriff he was entitled to seize under it any property which the debtor might have disposed of with intent to defraud his creditors; that by such seizure a specific lien was acquired upon the property attached, and the sheriff, when sued for wrongfully taking the property, had a right to show, even before judgment in the attachment suit, that the title of the purchaser from the debtor was fraudulent and voidable as against the attaching creditor.[5]

§ 60. **By suit in equity.**—Fraud is one of the recognized subjects of equity jurisdiction, and is the most ancient

[1] Carter v. Castleberry, 5 Ala. 277; Booth v. Bunce, 33 N. Y. 139; Henry v. Hinman, 25 Minn. 199; Brown v. Snell, 46 Me. 490; Thomason v. Neeley, 50 Miss. 313; Jacoby's Appeal, 67 Pa. St. 434; Allen v. Berry, 50 Mo. 90; Fowler v. Trebein, 16 Ohio St. 493; Staples v. Bradley, 23 Conn. 167; Foley v. Bitter, 34 Md. 646; Gormerly v. Chapman, 51 Ga. 421; Russell v. Dyer, 33 N. H. 186. But see § 69.

[2] Tupper v. Thompson, 26 Minn. 386; Henry v. Hinman, 25 Minn. 199; S. P. National Park Bank v. Lanahan, 60 Md. 513.

[3] Thomason v. Neeley, 50 Miss. 313. It has been observed that where the "deed is a mere pretence, collusively devised, and the parties do not intend other than an ostensible change of the property, the property does not pass as to creditors; and even when the parties intend an irrevocable disposition of the property, but the conveyance has been made with the intent to defraud creditors," it may be avoided. Chandler v. Von Roeder, 24 How. 227; Baldwin v. Peet, 22 Tex. 708, note. In Massachusetts, jurisdiction in equity is limited to property or rights which cannot be attached or taken on execution. Schleisinger v. Sherman, 127 Mass. 209.

[4] 26 How. Pr. (N. Y.) 75; S. C. 31 N. Y. 140.

[5] See Greenleaf v. Mumford, 30 How. Pr. (N. Y.) 30, 31. But compare Thurber v. Blanck, 50 N. Y. 83, with Mechanics' & Traders' Bank v. Dakin, 51 N. Y. 519. See Lawrence v. Bank of the Republic, 35 N. Y. 320; *infra*, § 81.

foundation of its power.[1] The existence of a remedy at law does not interfere with the right of a creditor to resort to a court of equity[2] to secure a cancellation of a fraudulent conveyance as an obstacle in the way of the full enforcement of a judgment, and a cloud on the title to the property sought to be reached.[3] The suit in equity is sometimes said to be an ancillary relief in aid of the legal remedy,[4] since a court of equity does not intervene to enforce the payment of debts.[5] It may be asked why resort is so frequently had to a creditor's bill seeking a decree to avoid or cancel the covinous transfer when the property may be more expeditiously seized under attachment or execution. The creditor's bill, or a suit to clear the fraudulent transfer, is, for many reasons, entitled to preference as a means of relief. Should the creditor attempt to sell the disputed property arbitrarily under execution bidders would be deterred from purchasing lest they should buy a lawsuit, hence the market value of the land embraced in the covinous transfer is practically destroyed. Then the seizure of the property subjects the creditor to the peril incident to proving that

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[1] Hartshorn v. Eames, 31 Me. 97; Story's Equity, § 68. See Warner v. Blakeman, 4 Keyes (N. Y.) 507; Logan v. Logan, 22 Fla. 564.

[2] See § 51.

[3] Planters' & M. Bank v. Walker, 7 Ala. 926; Sheafe v. Sheafe, 40 N. H. 516: Dargan v. Waring, 11 Ala. 988; Cook v. Johnson, 12 N. J. Eq. 52; Bean v. Smith, 2 Mason 253; Hamlen v. McGillicuddy, 62 Me. 269; Waddell v. Lanier, 62 Ala. 347; Traip v. Gould, 15 Me. 83; Beaumont v. Herrick, 24 Ohio St. 456; Sockman v. Sockman, 18 Ohio 368; Musselman v. Kent, 33 Ind. 452; Dockray v. Mason, 48 Me. 178. In Gormley v. Potter, 29 Ohio St. 599, the court said: "The petition was founded upon the fact that the land had been taken in execution, and had for its object the removal of the cloud cast upon the title by the fraudulent conveyance. The removal of this cloud was in the interest of both the debtor and the creditors by enabling the property to be sold at a better price." Again, it has been observed that "The creditor has not only a right to have the property subjected to the payment of his judgment, but to have it subjected in such manner that it will bring its fair market value." Fowler v. McCartney, 27 Miss. 510.

[4] See McCartney v. Bostwick, 32 N. Y. 57.

[5] Dunlevy v. Tallmadge, 32 N. Y. 459; Voorhees v. Howard, 4 Keyes (N. Y.) 383; Griffin v. Nitcher, 57 Me. 272; Logan v. Logan, 22 Fla. 564. See § 73.

the transfer was fraudulent, and in the event of failure to establish fraud, of paying damages for the unwarrantable interference, seizure, and sale. By filing a creditor's bill practically the only risk incurred is the costs and expense of the suit, for generally no seizure is effected unless the suit is successful, in which event the covinous transfer and cloud on the title is cleared away. Then, as already stated, equity procedure is more flexible than the procedure at law,[1] and in equity an inequitable transaction not absolutely fraudulent in the full sense of that term may be avoided at the suit of a creditor. Fraud it is said may be presumed in equity but must be proved at law;[2] but this is a loose and unreliable statement, for it must be proved in either forum. Courts of equity it is true will act upon circumstances indicating fraud which courts of law might scarcely deem satisfactory proofs; and will grant relief upon the ground of fraud established by presumptive evidence of such character as courts of law would not always deem sufficient to justify a verdict.[3] The Supreme Court of Pennsylvania,[4] in commenting upon the applicability of equity to suits involving fraudulent alienations, remark: "It is especially adapted to this class of cases. Its process is plastic and may be readily moulded to suit the exigencies of the particular case. A court of equity proceeds with but little regard to mere form. It moves with celerity, and seizes the fruits of a fraud in the hands of the wrong-doer." Having

[1] See § 51.

[2] King v. Moon, 42 Mo. 555.

[3] See Jackson v. King, 4 Cow. (N. Y.) 207; 3 Greenl. Ev. § 254; 1 Story's Eq. Jur. §§ 190–193. "*Fraud* is not to be considered as a simple fact, but a *conclusion* to be drawn from all the circumstances of the case. It may be inferred from the nature of the contract itself, or from the condition or circumstances of the parties. The general principle is well settled, that equity will give relief against *presumptive frauds*, and therein will go further than courts of law, where fraud must be proved and not presumed. . . . . There are many instances of fraud that would in equity affect instruments in writing concerning lands, of which the law could not take notice." Burt v. Keyes, 1 Flipp. 63. Compare United States v. Amistad, 15 Pet. 594; Lloyd v. Fulton, 91 U. S. 483. See § 15.

[4] Fowler's Appeal, 87 Pa. St. 454.

jurisdiction for one purpose equity will make a complete disposition of the cause.[1] Equity endeavors to deal with the substance of affairs; to look beyond the observance of mere forms;[2] to regulate its judgment according to the real purposes which controlled parties in the various matters brought before it for relief or correction;[3] to tear aside the covering beneath which the perpetrators of the fraud seek concealment; to deal with actual facts, not with pretexts and disguises. The Supreme Court of Illinois say: "Equity will penetrate beyond the covering of form, and look at the substance of a transaction, and treat it as it really and in essence is, however it may seem."[4]

Rules of pleading in equity are not so strict in matters of form as at law.[5]

§ 61. **Supplementary proceedings.**—Supplementary proceedings have, in New York and in some of the other States which have appropriated its reformed system of procedure, taken, in some measure, the place of creditors' actions or suits in equity to reach equitable assets. This remedy is

[1] Manufacturing Co. v. Bradley, 105 U. S. 182; Oelrichs v. Spain, 15 Wall. 211; Crane v. Bunnell, 10 Paige (N. Y.) 333; Billups v. Sears, 5 Gratt. (Va.) 31; Pearce v. Creswick, 2 Hare 296; Martin v. Tidwell, 36 Ga. 345; Sanborn v. Kittredge, 20 Vt. 632; Souder's Appeal, 57 Pa. St. 498, 502; Corby v. Bean, 44 Mo. 379.

[2] Wright v. Oroville M. Co., 40 Cal. 20. In Buck v. Voreis, 89 Ind. 117, Elliott, J., said: "Forms are of little moment, for where fraud appears courts will drive through all matters of form and expose and punish the corrupt act." Of course equity "cannot create a title where none exists." . . . . "Creditors can work out equities only through the rights of the parties where there is no fraud." Rush v. Vought, 55 Pa. St. 438, 444, quoted in Curry v. Lloyd, 22 Fed. Rep. 265.

[3] Livermore v. McNair, 34 N. J. Eq. 482; Buck v. Voreis, 89 Ind. 117.

[4] Wadhams v. Gay, 73 Ill. 415, 435. See Gay v. Parpart, 106 U. S. 699.

[5] Birely's Ex'rs v. Staley, 5 Gill & J. (Md.) 432; Ridgely v. Bond, 18 Md. 450; Small v. Owings, 1 Md. Ch. 367. In Warner v. Blakeman, 4 Keyes (N. Y.) 507, Woodruff, J., said: "It is the just and proper pride of our matured system of equity jurisprudence that fraud vitiates every transaction; and, however men may surround it with forms, solemn instruments, proceedings conforming to all the details required in the laws, or even by the formal judgment of courts, a court of equity will disregard them all, if necessary, that justice and equity may prevail."

now a special proceeding in New York,[1] and not a proceeding in the original action. These proceedings furnish, to a certain extent, a substitute for a creditor's bill,[2] for the discovery and sequestration of property,[3] and by their commencement a lien is said to be acquired upon the debtor's equitable assets,[4] though another creditor may gain precedence if, after the service of the order for the examination of the debtor, and before the appointment of a receiver, he discovers property liable to execution and levies upon it.[5] Generally speaking these proceedings will reach whatever property is available on a creditor's bill,[6] and have, as we have seen, been held to be a simple substitute for it,[7] and are entitled to all the presumptions of regularity which appertain to proceedings in courts of general jurisdiction.[8] Supplementary proceedings are not exclusive.[9] The judgment-creditor may abandon them and institute a suit in his own name to annul a fraudulent alienation,[10] if indeed he may not invoke both remedies at the same time.[11] If a third party makes claim to any property which the examination

[1] N. Y. Code Civ. Pro., § 2433. Compare West Side Bank v. Pugsley, 47 N. Y. 368.

[2] Spencer v. Cuyler, 9 Abb. Pr. (N. Y.) 382; People v. Mead, 29 How. Pr. (N. Y.) 360; Pope v. Cole, 64 Barb. (N. Y.) 409; affi'd, 55 N. Y. 124. Compare Catlin v. Doughty, 12 How. Pr. (N. Y.) 459.

[3] Becker v. Torrance, 31 N. Y. 631; Billings v. Stewart, 4 Dem. (N. Y.) 269.

[4] Lynch v. Johnson, 48 N. Y. 33; Storm v. Waddell, 2 Sandf. Ch. (N. Y.) 494; Brown v. Nichols, 42 N. Y. 26; Edmonston v. McLoud, 16 N. Y. 544; Billings v. Stewart, 4 Dem. (N. Y.) 268. Compare Dubois v. Cassidy, 75 N. Y. 300; Campbell v. Genet, 2 Hilt. (N. Y.) 290; Robinson v. Stewart, 10 N. Y. 196. Although the lien acquired by the judgment-creditor in these proceedings is not divested by the death of the debtor it cannot be enforced in a Surrogate's Court unless prior to the death a receiver was appointed or an order was made directing the application of the debtor's property to the satisfaction of the judgment. Billings v. Stewart, 4 Dem. (N. Y.) 265.

[5] Becker v. Torrance, 31 N. Y. 631. See Davenport v. Kelly, 42 N. Y. 193.

[6] Barnes v. Morgan, 3 Hun (N. Y.) 703; Barker v. Dayton, 28 Wis. 367.

[7] Lynch v. Johnson, 48 N. Y. 33; Smith v. Weeks, 60 Wis. 100. Compare Williams v. Thorn, 70 N. Y. 270. See § 45.

[8] Wright v. Nostrand, 94 N. Y. 31.

[9] Williams v. Sexton, 19 Wis. 42.

[10] Bennett v. McGuire, 58 Barb. (N. Y.) 625.

[11] Gates v. Young, 17 Weekly Dig. (N. Y.) 551. See §§ 51, 65.

discloses, the rights of the claimants cannot be determined in this proceeding, but resort must be had to a suit.[1] The procedure is usually by order, made upon proof of the return of an execution unsatisfied, requiring the debtor to appear in person in court, to be examined concerning his property.[2] The judgment upon which the order is procured must be *in personam*.[3] Property or equitable assets being thus disclosed, a receiver is appointed, who, upon qualifying, becomes vested with the debtor's assets and equitable interests, without conveyance or assignment,[4] though he does not get title to exempt property.[5] The receiver represents creditors, and thus may impeach the debtor's fraudulent sales[6] in the right of creditors. It seems to be no objection to the exercise of the jurisdiction appointing a receiver that the debtor has no assets,[7] or that such property as he is possessed of is subject to execution.[8]

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[1] West Side Bank v. Pugsley, 47 N. Y. 372; Bennett v. McGuire, 58 Barb. (N. Y.) 634; Rodman v. Henry, 17 N. Y. 484; Sebrauth v. Dry Dock Savings Bank, 20 Alb. L. J. 197. Supplementary proceedings may be instituted before a judge of a Federal court, on a judgment at law recovered in the United States Courts. *Ex parte* Boyd, 105 U. S. 647. Compare Senter v. Mitchell, 5 McCra. 147. But the examination cannot be held in a State court upon a Federal judgment. Tompkins v. Purcell, 12 Hun (N. Y.) 662. Compare Goodyear Vulcanite Co. v. Frisselle, 22 Hun (N. Y.) 175.

[2] Bartlett v. McNeil, 49 How. Pr. (N. Y.) 55; affi'd, 60 N. Y. 53.

[3] Bartlett v. McNeil, 3 Hun (N. Y.) 221. Compare Schwinger v. Hickok, 53 N. Y. 280.

[4] Porter v. Williams, 9 N. Y. 142; Cooney v. Cooney, 65 Barb. (N. Y.) 524; Bostwick v. Menck, 40 N. Y. 383.

[5] Cooney v. Cooney, 65 Barb. (N. Y.) 525; Hudson v. Plets, 11 Paige (N. Y.) 180; Andrews v. Rowan, 28 How. Pr. (N. Y.) 126. See Tillotson v. Wolcott, 48 N. Y. 190; Hancock v. Sears, 93 N. Y. 79.

[6] Dollard v. Taylor, 33 N. Y. Super. 498; Bostwick v. Menck, 40 N. Y. 384; Porter v. Williams, 9 N. Y. 142.

[7] See Browning v. Bettis, 8 Paige (N. Y.) 568; Bloodgood v. Clark, 4 Paige (N. Y.) 574; Shainwald v. Lewis, 6 Fed. Rep. 776. Monell, J., held, in Dollard v. Taylor, 33 N. Y. Superior Ct. 496, that where the only purpose of appointing a receiver in supplementary proceedings was to attack a fraudulent assignment, the application was properly denied, as the judgment-creditor could himself file a bill for that purpose, and in a proper case secure a receiver pending the suit.

[8] Bailey v. Lane, 15 Abb. Pr. (N. Y.) 373, in note. The order in supplementary proceedings usually forbids the debtor from making a transfer of his property until further directions; but in New York his earnings within sixty days of

As an illustration of the utility of this remedy it may be stated that a widow's unassigned right of dower can be reached by her creditors in supplementary proceedings,[1] for it is liable to their claims,[2] and a receiver appointed in these proceedings may bring an action for its admeasurement.[3]

§ 62. **Assumpsit—Case—Conspiracy.**—A fraudulent assignment will not ordinarily authorize a judgment against the purchaser for the original debt;[4] nor is an action on the case considered to be an appropriate form of procedure against the debtor and his fraudulent alienee. The latter form of action is discussed at much length in Lamb v. Stone,[5] and the language of the court is quoted with approval by the learned and lamented Mr. Justice Campbell in Adler v. Fenton,[6] as follows: "The plaintiff complained of the fraud of the defendant in purchasing the property of his absconding debtor, in order to aid and abet him in the fraudulent purpose of evading the payment of his debt. The court ask, what damage has the plaintiff sustained by the transfer of his debtor's property? He has lost no lien, for he had none. No attachment has been defeated, for none had been made. He has not lost the custody of his debtor's body, for he had not arrested him. He has not been prevented from attaching the property, or arresting the body of his debtor, for he had never procured any writ

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the commencement of the proceedings are exempt, and it is not considered a contempt of the court's order for him to apply them to the support of his family. Hancock v. Sears, 93 N. Y. 79; Newell v. Cutler, 19 Hun (N. Y.) 74, is overruled. The salary of a municipal officer cannot be reached in these proceedings. Waldman v. O'Donnell, 57 How. Pr. (N. Y.) 215. But examine Singer v. Wheeler, 6 Ill. App. 225.

[1] Strong v. Clem, 12 Ind. 37; Payne v. Becker, 87 N. Y. 153.

[2] Tompkins v. Fonda, 4 Paige (N. Y.) 448.

[3] Payne v. Becker, 87 N. Y. 153. See Stewart v. McMartin, 5 Barb. (N. Y.) 438. It may be noted in concluding this section that an attorney employed to collect a claim has authority to institute supplementary proceedings, but is not authorized under the original retainer to direct the receiver to institute an action to annul a fraudulent transfer. Ward v. Roy, 69 N. Y. 96.

[4] Aspinall v. Jones, 17 Mo. 212. See Chap. XI.

[5] 11 Pick. (Mass.) 527.

[6] 24 Howard 412.

of attachment against him. He has lost no claim upon, or interest in the property, for he never acquired either. The most that can be said is, that he intended to attach the property, and the wrongful act of the defendant has prevented him from executing this intention. . . . . On the whole, it does not appear that the tort of the defendant caused any damage to the plaintiff. But even if so, yet it is too remote, indefinite, and contingent, to be the ground of an action." Many cases might be cited to the same general effect.[1] In an action on the case for conspiracy which arose in Rhode Island,[2] the plaintiffs, who were simple contract creditors, claimed that the defendants and the debtor had combined together to prevent plaintiffs and other creditors from obtaining payment of their debts; that the debtor, among other things, had made fictitious mortgages to the defendants under cover of which the latter had secreted the property and removed it out of the debtor's possession, so that plaintiffs were prevented from attaching it, and had thus lost their claims. The court ruled that the action could not be maintained.[3] "A simple

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[1] Smith v. Blake, 1 Day (Conn.) 258; Moody *v.* Burton, 27 Me. 427; Gardiner v. Sherrod, 2 Hawks (N. C.) 173; Kimball v. Harman, 34 Md. 407; Austin v. Barrows, 41 Conn. 287; Green v. Kimble, 6 Blackf. (Ind.) 552; Wellington v. Small, 3 Cush. (Mass.) 146; Bradley v. Fuller, 118 Mass. 239; Mowry v. Schroder, 4 Strob. (S. C.) Law 69.

[2] Klous v. Hennessey, 13 R. I. 335.

[3] Chief-Justice Durfee said: "There is some conflict of authority on the question thus raised, but the more numerous, and, we think, the better reasoned and stronger cases are against the action. The principal ground of decision in these cases is that the damage, which is the gist of the action, is too remote, uncertain, and contingent, inasmuch as the creditor has, not an assured right, but simply a *chance* of securing his claim by attachment or levy, which he may or may not succeed in improving. It is impossible to find any measure of damages for the loss of such a mere chance or possibility. Another ground, added in some of the cases, is that no action would lie in favor of such a creditor against the debtor for putting his property beyond the reach of legal process, if the debtor were to do it by himself alone, and that what would not be actionable if done by himself alone, cannot be actionable any the more when done by him with the assistance of others. The first of these grounds, which is the fundamental one, and has been chiefly relied on, has been so exhaustively

conspiracy," says Nelson, J., in Hutchins v. Hutchins,[1] "however atrocious, unless it resulted in actual damage to the party, never was the subject of a civil action, not even when the old form of a writ of conspiracy, in its limited and most technical character, was in use." Yet authority can be cited tending to uphold a recovery in such cases. In Meredith v. Johns,[2] it appeared that an action of tort had been brought, and a verdict for £500 rendered, against a third party, for secretly and maliciously taking, carrying away, and concealing the slaves and property of one Peter May (against whom the plaintiff had a cause of action), and also for aiding, assisting, and counselling May to absent himself, to the end that the creditor might be prevented from recovering against him. The Supreme Court of Appeals of Virginia declined to interfere in equity to restrain the enforcement of the judgment, and took the position that the defense was a legal one, and that the party aggrieved must seek redress in a law court. It seems, however, to have approved the procedure.[3] The case of Quinby v. Strauss,[4] of which the reports are meagre and unsatisfactory, is another illustration. The action was instituted by judgment-creditors of one of the defendants against such defendant and his attorney, charging them with having fraudulently conspired together to keep the debtor's personal property out of the reach of his creditors by the execution of chattel mortgages thereon to secure fictitious debts, one of them to the attorney, under which the property had been sold and bid off in the attorney's interest. The property so sold exceeded in value the amount of the creditor's judgment. The jury found that there was

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analyzed and discussed in the cases that it is impossible for us to add anything to the reasons adduced in support of it." Klous v. Hennessey, 13 R. I. 335.

[1] 7 Hill (N. Y.) 107.

[2] 1 H. & M. (Va.) 595.

[3] Compare Mott v. Danforth, 6 Watts (Pa.) 307; Penrod v. Morrison, 2 P. & W. (Pa.) 126.

[4] 90 N. Y. 664.

a conspiracy and the judgment was upheld, the appellate court saying that as the property appropriated by the attorney to his own use exceeded in value the amount of the creditor's claim, it was but just that he should pay the creditor whose demand he had sought to defeat. The point that nominal damages only could be awarded was expressly overruled. The recovery in this case must, however, be rested upon the ground that the attorney had a sufficient amount of the debtor's property in his hands to satisfy the complaining creditor's claim. In such a case the rule that only nominal damages are recoverable is not controlling.

§ 62*a*. **Reference not ordered.**—In New York State an action to set aside a fraudulent conveyance will not be referred. Gilbert, J., said: "References are proper only as aids to facilitate the transaction of business. The growing multiplication of them within the last fifteen years has been an evil prolific of individual injustice and public alarm." [1]

§ 63. **Relief collateral to main action.**—The rule is established in New York that in surplus-money proceedings in a foreclosure suit, the referee has the authority to inquire as to the validity of liens or conveyances, and they may be attacked as fraudulent.[2] In a reference as to title in partition, a party can assail a mortgage held by another party on the ground that it is fraudulent and void as against creditors.[3] It is asserted that no good reason exists why the fraudulent character of conveyances cannot be tested in such proceedings. When the jurisdiction of equity is once acquired, the court has the right to proceed to the end and administer complete justice between the parties.[4] This

[1] Bushnell v. Eastman, 2 Abb. Pr. N. S. (N. Y.) 411.

[2] Bergen v. Carman, 79 N. Y. 147; s. c. 1 Am. Insolv. Rep. 341. Compare Schafer v. Reilly, 50 N. Y. 61; Mutual Life Ins. Co. v. Bowen, 47 Barb. (N. Y.) 618; Fliess v. Buckley, 90 N. Y. 292.

[3] Halsted v. Halsted, 55 N. Y. 442.

[4] Manufacturing Co. v. Bradley, 105 U. S. 182; Oelrichs v. Spain, 15 Wall. 211; Martin v. Tidwell, 36 Ga. 345; Souder's Appeal, 57 Pa. St. 498, 502.

practice is considered more convenient for the disposition of cases of this character, and avoids the tedious process and increased expense incident to a distinct and separate action instituted for that purpose. Again, actions in aid of an execution at law are ancillary to the original suit, and are, in effect, a continuance of the suit at law to obtain the fruits of the judgment, or to remove obstacles to its enforcement.[1] Usually the titles of adverse claimants cannot be litigated in foreclosure.[2]

§ 64. **Remedy governed by lex fori.**—In a case already cited which arose in Massachusetts,[3] it was said that the law of New York respecting fraudulent conveyances was the same as the common law and the law of Massachusetts; and that although choses in action could not be attached or levied upon in New York, yet after execution issued on the judgment at law, such interests might be reached by supplementary proceedings; while in Massachusetts these kinds of rights were subject to trustee process. The court said that the assignment having been found by the judge, before whom the case was tried without a jury, to have been made in fraud of the plaintiff, as a creditor of the assignor, and being under the law of either State voidable by creditors in some form of judicial process, the question whether it should be relieved against on the common law, or on the equity side of the court, was a question of remedy only, and governed by the *lex fori*.[4] It may be observed that the general rule that the *lex fori* governs the remedy controls the right to arrest the debtor. Thus where goods were sold in New York on credit to parties who transacted

[1] Claflin v. McDermott, 12 Fed. Rep. 375; S. C. 20 Blatchf. 522.

[2] Kinsley v. Scott, 58 Vt. 470; Merchants' Bank v. Thomson, 55 N. Y. 11; Lewis v. Smith, 9 N. Y. 514.

[3] Drake v. Rice, 130 Mass. 413. See § 17.

[4] In the case of a sale of horses and mules that took place in Virginia, where the stock was subsequently sent to Pennsylvania for pasturage, and was there seized on a foreign attachment against the vendor, it was held that the validity of the transfer must be tested by the laws of Virginia. Born v. Shaw, 29 Pa. St. 288.

business in Alabama, and the debtors subsequently disposed of their property in the latter State with intent to defraud their creditors, the New York Supreme Court held that an order of arrest was properly issued against the defendants by that court.[1] In Pritchard v. Norton,[2] the court said: "The principle is that whatever relates merely to the remedy, and constitutes part of the procedure, is determined by the law of the forum, for matters of process must be uniform in the courts of the same country; but whatever goes to the substance of the obligation, and affects the rights of the parties, as growing out of the contract itself, or inhering in it or attached to it, is governed by the law of the contract."[3] It is foreign to the scope of this treatise to discuss at length the question of how far a transfer of personal property, which is lawful in the owner's domicil, will be respected in the courts of the country where the property is located, and where a different rule as to transfer prevails. This is a question upon which the courts are much at variance. It must be remembered that there is no absolute right to have such a transfer respected in the foreign forum, and it is only on a principle of comity that it is ever allowed. And this principle of comity always yields in cases where the laws and policy of the State in which the property is located have prescribed a different rule of transfer from that of the State in which the owner lives.[4]

[1] Claflin v. Frenkel, 3 Civ. Pro. (N. Y.) 109; Brown v. Ashbough, 40 How. Pr. (N. Y.) 226. See § 191. A fraudulent disposition of property in Pennsylvania may be made the subject of attachment in New York. Kibbe v. Wetmore, 31 Hun (N. Y.) 424.

[2] 106 U. S. 129.

[3] See McDougall v. Page, 55 Vt. 187; S. C. 28 Alb. L. J. 372.

[4] Green v. Van Buskirk, 7 Wall. 151; reversing, S. C. *sub nomine*, Van Buskirk v. Warren, 4 Abb. App. Dec. (N. Y.) 457. Compare Guillander v. Howell, 35 N. Y. 657; Ockerman v. Cross, 54 N. Y. 29; Howard Nat. Bk. v. King, 10 Abb. N. C. (N. Y.) 346; People *ex rel.* Hoyt v. Commissioners of Taxes, 23 N. Y. 225; Chafee v. Fourth Nat. Bank, 71 Me. 514, and cases cited in the arguments of counsel. There is no presumption that the common law prevails in Russia (Savage v. O'Neil, 44 N. Y. 300),—a presumption of its existence is indulged by the courts only in reference to England and the States which have taken the common law. In the absence of proof of the foreign law, the

§ 65. Cumulative remedies allowed and disallowed.—We have disclaimed the consideration of fraud in the light of a crime,[1] and entertain no design of noticing the penal statutes enacted for the punishment of fraudulent insolvents or their co-conspirators. This subject more legitimately appertains to a treatise on criminal law,[2] and is a matter regulated by statute. Sometimes resort to the penal statutes conflicts with the pursuit of the civil remedy. In a controversy which arose in Maine it was decided that one who had commenced an action to recover the penalty provided by the Revised Statutes[3] of that State, for knowingly aiding a debtor in the fraudulent transfer of his property to secure it from the creditors, waived his right to prosecute his suit by filing a petition against his debtor and having him declared a bankrupt, and then causing a suit to be commenced against the alleged fraudulent transferee by the assignee in bankruptcy, to recover the value of the property alleged to have been fraudulently transferred.[4] As to civil remedies it was decided in Michigan that where a judgment-creditor had elected to treat as fraudulent a conveyance made by his debtor before the judgment, and, notwithstanding the transfer of title, had proceeded to sell the property on an execution, he could not afterward maintain a bill in equity to set aside the conveyance.[5] The logic of this ruling is scarcely apparent. Again, a creditor who has instituted an action at law for the recovery of a debt, and levied an attachment, cannot, before judgment, bring a second suit to recover the debt, annul an alleged fraudulent judgment recovered against the debtor, and restrain its collection.[6] In New

law of the forum must furnish the rule for the guidance of the courts. Savage v. O'Neil, 44 N. Y. 301; Monroe v. Douglass, 5 N. Y. 447.

[1] See § 3.

[2] An indictment alleging the making of a fraudulent conveyance is sufficient where its recitals charge the language of the statute. State v. Miller, 98 Ind. 70.

[3] C. 113, § 51.

[4] Fogg v. Lawry, 71 Me. 215.

[5] Cranson v. Smith, 47 Mich. 647. But see Erickson v. Quinn, 15 Abb. Pr. N. S. (N. Y.) 168.

[6] Mills v. Block, 30 Barb. (N. Y.) 549. See § 85.

York, on the other hand, a complainant may institute supplementary proceedings and prosecute a suit to establish his judgment as a lien upon real estate; he may prosecute either or both proceedings until his judgment is satisfied.[1] So he may bring a creditor's action to remove a cloud upon title, and also sell the debtor's land under execution.[2] And in Massachusetts a remedy is given by statute,[3] which enables a creditor to maintain a bill to reach equitable assets, without having previously recovered a judgment at law, and without admitting other creditors to join in prosecuting the suit. It was decided that this remedy was not superseded by the grant of general equity powers.[4]

§ 66. **Effect of imprisonment of debtor.**—It may be considered as settled law that while the creditor has the body of the debtor in execution on a *ca. sa.* his right to proceed against property is suspended. So long as the defendant is in custody the creditor cannot file a bill in chancery to reach his equitable assets.[5] This rule proceeds upon the theory that the arrest and imprisonment of the debtor constitute a satisfaction of the judgment during the continuance of the imprisonment.[6]

§ 67. **Election of remedies.**—In Cone v. Hamilton,[7] the Supreme Court of Massachusetts said it had been decided in that State that levies of executions in favor of creditors passed no title where, at the time of the conveyance (which was before the Stat. of 1844, c. 107, took effect), there was no statute by which land paid for and occupied by a debtor, the legal title to which had never been in him, but had

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[1] Gates v. Young, 17 Weekly Dig. (N. Y.) 551.

[2] Erickson v. Quinn, 15 Abb. Pr. N. S. (N. Y.) 166.

[3] Gen'l Stat., c. 113, § 2, sub. 11.

[4] Barry v. Abbot, 100 Mass. 396.

[5] Stilwell v. Van Epps, 1 Paige (N. Y.) 615; Tappan v. Evans, 11 N. H. 321; King v. Trice, 3 Ired. Eq. (N. C.) 573.

[6] Koenig v. Steckel, 58 N. Y. 475; Bowe v. Campbell, 63 How. Pr. (N. Y.) 170; Ryle v. Falk, 24 Hun (N. Y.) 255. Compare, especially, Kasson v. People, 44 Barb. (N. Y.) 347.

[7] 102 Mass. 57.

been conveyed by his procurement to other persons in order to secure it from his creditors, could be attached or taken on execution at law as his property.[1] Gray, J., continuing, said: "Upon this state of facts, either of two remedies was opened to the judgment-creditors. The conveyance being fraudulent as against them, the parties who took the legal title (though not participating in the fraud), paying no consideration for the conveyance, and the equitable title being in the debtor who paid the purchase-money, the judgment-creditors might doubtless have maintained bills in equity to charge the land with their debts.[2] Or, it appearing that the land cannot be held under their levies, they might, by *scire facias*, have obtained new executions on the original judgments.[3] It does not, however, follow that this bill can be maintained in its present form. The plaintiff has acquired no interest in those judgments, or in the debts on which they were recovered. The only transfers from the judgment-creditors, under which she claims, are quitclaim deeds, without covenants of warranty, of the land taken on execution, which, as the grantors had no title, passed none. Those creditors are not made parties to this suit, either as plaintiffs or defendants, and would therefore be at liberty, notwithstanding any decree therein, to pursue their remedy by *scire facias* against their debtor. It would be inconsistent with the principles and the practice of courts of equity to maintain this bill, upon the ground that the original conveyance was fraudulent and void as against the judgment-creditors, without making them parties to the suit in due form." It may be further observed that a judgment-creditor is not obliged to follow

[1] Hamilton v. Cone, 99 Mass. 478.

[2] Huguenin v. Baseley, 14 Ves. 273; Neate v. Marlborough, 3 Myl. & Cr. 407; Goldsmith v. Russell, 5 De G., M. & G. 547; Bayard v. Hoffman, 4 Johns. Ch. (N. Y.) 450; Lynde v. McGregor, 13 Allen (Mass.) 182.

[3] Dennis v. Arnold, 12 Met. (Mass.) 449; Dewing v. Durant, 10 Gray (Mass.) 29; Gen. Stats. of Mass. c. 103, § 22.

all the fraudulent conveyances which may have been made by several execution defendants, but may leave some of them to stand while he seeks to set aside others;[1] nor can the debtor or the fraudulent alienee, as a general rule, compel the creditor to elect which method of procedure or class of property he will pursue.[2]

§ 68. **Creditors' bills.**—It is said in New York,[3] that the object of a creditor's bill in that State [4] is to reach choses in action and equitable assets of the judgment-debtor which cannot be reached by execution. And, before such a bill can be filed, it is always necessary that an execution should be issued to the county where the judgment-debtor resides,[5] and be returned unsatisfied;[6] and in such an action all the judgment-debtors are necessary parties, unless it can be shown that one omitted is insolvent or a mere surety for the defendant. The filing of a creditor's bill, and the service of process, as we have said,[7] creates a lien in equity upon the effects of the judgment-debtor.[8] It has been aptly termed an "equitable levy." [9] It may be here observed that a creditor's bill, in many of our States, is an appropriate

[1] First Nat. Bank v. Hosmer, 48 Mich. 200; Miller v. Dayton, 47 Iowa 312.

[2] Gray v. Chase, 57 Me. 558; Vasser v. Henderson, 40 Miss. 519; Edmunds v. Mister, 58 Miss. 766; Baker v. Lyman, 53 Ga. 339.

[3] Fox v. Moyer, 54 N. Y. 128. Mr. Bispham says, in his Principles of Equity, § 246: "In many of the States, property of an equitable character, and property conveyed in fraud of creditors, may be reached by a *creditor's bill;* a remedy which may be considered as having originated in the case of Spader v. Davis [5 Johns. Ch. (N. Y.) 280, decided by Chancellor Kent] in the year 1821, and which has been very extensively employed since that time."

[4] See 2 R. S. 174; 2 Barb. Ch. Pr. 147.

[5] Compare Wadsworth v. Schisselbauer, 32 Minn. 87.

[6] Compare The Holladay Case, 27 Fed. Rep. 845.

[7] See § 61.

[8] Per Swayne, J., in Miller v. Sherry, 2 Wall. 249. Citing Bayard v. Hoffman, 4 Johns. Ch. (N. Y.) 450; Beck v. Burdett, 1 Paige (N. Y.) 308; Storm v. Waddell, 2 Sandf. Ch. (N. Y.) 494; Corning v. White, 2 Paige (N. Y.) 569; Edgell v. Haywood, 2 Atk. 352. See Brown v. Nichols, 42 N. Y. 26; Lynch v. Johnson, 48 N. Y. 33; Roberts v. Albany & W. S. R.R. Co., 25 Barb. (N. Y.) 662; George v. Williamson, 26 Mo. 190.

[9] Tilford v. Burnham, 7 Dana (Ky.) 110; Miller v. Sherry, 2 Wall. 249.

remedy to annul a conveyance in fraud of creditors. It ought always to be resorted to where this latter relief is desired. "A creditor's bill is the continuation of the former controversy, so far as the fruits of the judgment are concerned. The complainant asks the aid of the court to reach the assets of the defendant, so as to be made liable to his judgment, which assets have been secreted or fraudulently assigned to defeat the judgment."[1] Usually creditors' bills are largely regulated by statute, and the relief extended is often in a measure dependent upon the local laws governing the subject. It may be asked in what respects a creditor's bill differs from an ordinary bill in equity, prosecuted to cancel a covinous conveyance or remove a fictitious transfer. The answer is that the creditor's bill, at least in some States, is broader and more effectual in its operations and results. The ordinary bill or suit in equity is generally brought to unravel some particular transaction, and to annul some particular conveyance, or remove a cloud on a particular title.[2] A creditor's bill, on the other hand, is usually in the nature of a bill of discovery,[3] and is more extended in its results; not only does it reach property described therein, but by means of this form of remedy every species of assets, and even debts due the debtor of which the creditor knew nothing, and which were not referred to in the bill, may be reached through the instrumentality of a receiver, and applied to the claim. For this reason it is appropriately called an omnibus bill.[4] "Creditors' bills," says

[1] Hatch v. Dorr, 4 McLean 112.

[2] See Brown v. Nichols, 42 N. Y. 26; Lynch v. Johnson, 48 N. Y. 33; Roberts v. Albany & W. S. R.R. Co., 25 Barb. (N. Y.) 662; George v. Williamson, 26 Mo. 190.

[3] See Newman v. Willetts, 52 Ill. 101.

[4] In Conro v. Port Henry Iron Co. (12 Barb. [N. Y.] 58), the court said: "There are two sorts of creditors' bills known to our jurisprudence; the one is the statutory bill, framed under 2 R. S. 173, in aid of a judgment-creditor who has exhausted his remedy at law, to enable him to discover the debtor's property, and to reach his equitable interests. This bill was known before the statute. (Hadden v. Spader, 20 Johns. [N. Y.] 554.) And the statute was framed to aid in carrying out the principle of that and other like decisions. In proceedings under such bill,

Mr. Bispham,[1] "are bills filed by creditors for the purpose of collecting their debts out of the real or personal property of the debtor, under circumstances in which the process of execution at common law could not afford relief.

it had always been held that several creditors, by judgment, of the same debtor, might unite in the action, though they had no other common interest than in the relief sought. (Edmeston v. Lyde, 1 Paige [N. Y.] 637; Wakeman v. Grover, 4 Paige [N. Y.] 23.) All the judgment-creditors were *proper* parties, though not *necessary* parties, because the action could not be sustained by a single judgment-creditor. The same rule existed before the statute, and was applied in a creditor's suit by Chancellor Kent in McDermutt v. Strong (4 Johns. Ch. [N. Y.] 687). The other class of creditors' suits, not depending upon any statute, are suits brought for the administration of assets, to reach property fraudulently disposed of, or held in trust, etc. The bill in such case is filed in behalf of the plaintiff or plaintiffs, and all others standing in a similar relation, who may come in under such bill and the decree to be made. It may be filed by simple contract creditors, and does not require a judgment to have been obtained. (Barb. Chan. Prac., vol. II., p. 149)." In Fusze v. Stern, 17 Bradw. (Ill.) 432, the court said: "There are several kinds of original bills known to our laws, wherein courts of equity entertain jurisdiction to aid a creditor in obtaining satisfaction of his claim from his debtor, and which are generally denominated creditors' bills, not only by the members of the legal profession, but by the courts as well, as where a debtor seeks to satisfy his debt out of some equitable estate of the defendant which is not subject to levy and sale under an execution at law; then before he can have the aid of a court of equity to decree the *equitable* estate, subject to the payment of his debt, the creditor must show by his bill, as in other cases where invoking equitable jurisdiction, that he has no adequate remedy at law, which can only be shown by alleging and proving that he has exhausted all the means provided by the law for the collection of his debt, viz., a recovery of judgment, the issuing of execution, and its return *nulla bona* by the officer charged with its collection. Another kind of bill analogous to this is where the creditor, having recovered judgment against his debtor, seeks to remove a fraudulent conveyance or incumbrance out of the way of an execution issued or to be issued upon such judgment. In such case equity will afford relief on the ground that such judgment is an equitable lien upon real estate, nominally held by a third party under such fraudulent conveyance, and the creditor having this lien is entitled to levy upon and sell upon his execution such real estate discharged and untrammeled from the cloud upon it caused by such conveyance. In bills of this kind the complainant need not even prove the return of execution *nulla bona*, as such conveyances are void by the statute, and courts of equity do not hesitate to declare them void because of such fraud, and place the creditor in the same position, respecting his judgment, that he would have occupied if such conveyance had not been made. A recovery of a judgment which at time of filing the bill would, in absence of

[1] Bispham's Principles of Equity, § 525.

This equitable remedy may be made use of during the lifetime of the debtor, or after his death. Creditors' bills filed against the estate of a decedent, generally, though not necessarily, partake of the nature of administration suits."

§ 69. Direct and collateral attack—Exceptional doctrine in Louisiana.—A novel principle relating to covinous conveyances, derived from the civil law, prevails in Louisiana. If a sale is fraudulent as to creditors it must be regularly set aside in a direct action or proceeding instituted for that purpose. Not only is it binding between the original parties, which is the universal rule,[1] but it is conclusive upon third parties until nullified by the form of action which the law provides, and the possession of the vendee is legal until the fraudulent instrument is avoided in the due course of law.[2] The reasons for this practice are ingeniously given in Peet v. Morgan,[3] by Porter, J., who there says: "Of its correctness the court entertains no doubt. It is clearly supported by authority, and it is sanctioned by reason and utility. The principle on which it rests is, that men are presumed to act honestly until the contrary is proved; that the conveyances alleged to be

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such conveyance, be a legal lien under the statute upon the land, is all that is necessary to aver and prove." Citing Miller v. Davidson, 8 Ill. 518; Weigtman v. Hatch, 17 Ill. 281; Shufeldt v. Boehm, 96 Ill. 561. Mr. Bispham says, in Principles of Equity, § 527: "The threefold advantage of reaching property otherwise exempt, of setting aside fraudulent conveyances, and of discovery, renders a creditors' bill a very effective instrument for the collection of debts." Creditors' bills are much used against insolvent corporations where the capital stock is treated as a trust fund. See Sawyer v. Hoag, 17 Wall. 610; Sanger v. Upton, 91 U. S. 56; Hatch v. Dana, 101 U. S. 205; County of Morgan v. Allen, 103 U. S. 498; Crandall v. Lincoln, 52 Conn. 73; Messersmith v. Sharon Savings Bank, 96 Pa. St. 440; Stone v. Chisolm, 113 U. S. 302.

[1] See Chap. XXVI.

[2] Yocum v. Bullit, 6 Mart. N. S. (La.) 324; s. c. 17 Am. Dec. 184, and the learned note of A. C. Freeman, Esq. See Barbarin v. Saucier, 5 Mart. N. S. (La.) 361; Le Goaster v. Barthe, 2 Rob. (La.) 388; Drummond v. Commissioners, 7 Rob. (La.) 234; Presas v. Lanata, 11 Rob. (La.) 288; Collins v. Shaffer, 20 La. Ann. 41; Payne v. Graham, 23 La. Ann. 771; Ford v. Douglas, 5 How. 166.

[3] 6 Mart. N. S. (La.) 137.

fraudulent are *prima facie* correct and fair; and that it is improper in opposition to these presumptions, the creditor should exercise rights that could only properly belong to him, in case the acts of his debtor were null and of no effect. In many instances, should a contrary doctrine prevail, sales which were alleged fraudulent might turn out to be *bona fide*, and the purchaser be deprived of the use and enjoyment of property which was honestly his. In the uncertainty which must prevail until the matter undergoes a judicial investigation, it is certainly the wisest course, and the one most conducive to general utility, to consider the thing sold as belonging to him in whom the title is vested." It is idle to speculate as to the utility of this doctrine, for it is entirely opposed to the general practice in the other States, and to the English and American authorities. The fraudulent transfer is not generally regarded as being effectual against creditors; it does not as to them divest the debtor's title, but his interest remains subject to their remedies, and may be seized and sold on execution.[1] The property may be treated and reached by creditors as though the transfer had never been made.[2] Thus in Imray v. Magnay,[3] the court said: "It is now of frequent occurrence that the sheriff is bound to take goods which have been fraudulently conveyed or assigned to defeat creditors,

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[1] Jacoby's Appeal, 67 Pa. St. 434; Hoffman's Appeal, 44 Pa. St. 95; Russell v. Dyer, 33 N. H. 186; Allen v. Berry, 50 Mo. 90; Ryland v. Callison, 54 Mo. 513; Fowler v. Trebein, 16 Ohio St. 493; Staples v. Bradley, 23 Conn. 167; Foley v. Bitter, 34 Md. 646; Gormerly v. Chapman, 51 Ga. 421; Freeman on Executions, § 136. "In an action of ejectment it is competent to show that a conveyance relied upon by one of the parties to the action was made with intent to defraud creditors." Knox v. McFarran, 4 Col. 595; citing Jackson v. Myers, 11 Wend. (N. Y.) 535; Jackson v. Burgott, 10 Johns. (N. Y.) 456; Remington v. Linthicum, 14 Pet. 84; Rogers v. Brent, 10 Ill. 580; Jamison v. Beaubien, 4 Ill. 114; Baze v. Arper, 6 Minn. 220; Cook v. Swan, 5 Conn. 140; Marcy v. Kinney, 9 Conn. 397; Lillie v. Wilson, 2 Root (Conn.) 517.

[2] Russell v. Winne, 37 N. Y. 591; Brown v. Snell, 46 Me. 490; Booth v. Bunce, 33 N. Y. 139; Angier v. Ash, 26 N. H. 99.

[3] 11 M. & W. 267.

and is responsible in an action for a false return at the suit of a creditor." Though the principle embodied in these Louisiana cases may seem logical and fair upon its face, certainly its practical operation would not be commensurate with the needs of creditors generally. The creditor cannot be expected to lay formal siege to every semblance of an obstruction that the debtor rears in his pathway. The theory concerning a fraudulent conveyance is that it has only the color and appearance of a valid act, and is not in itself effectual; why then should the creditor be forced to undergo the vexatious delay and expense incident to procuring a formal adjudication vacating every covinous alienation of property which the ingenuity of the debtor may devise? If the transfer is in fact fraudulent, then, by seizing and selling the property on execution, the controversy is practically concluded without further trouble or suit, and the fraudulent alienee will not be rash enough to attempt to reclaim it. On the other hand, if the transfer is *bona fide*, the creditor is legally accountable for the seizure. If the creditor unjustly refuses to treat the transfer as valid the purchaser, if it relate to realty, may hold the possession and defend in ejectment; while if it be personalty, he may recover it by replevin or sue in trover. In either case, if the vendee claims the property, indemnity would be exacted by the officer making the seizure. Under the Louisiana system a debtor, by selecting an irresponsible vendee, could shield him with a simulated transfer, and enable him to dissipate the property in practical defiance of the creditor.

§ 70. **Forms of relief in cases of fraud on wife.**—Special treatment of the relationship of husband and wife as bearing upon fraudulent transfers will be found in the body of the work.[1] We may allude here to the rule that where a husband has fraudulently alienated his real property, as against

[1] See Chap. XX.

the rights of his wife or prospective wife, she may, even during his lifetime, bring suit to annul the deed as a fraud upon her right of dower;[1] for an inchoate right of dower is an interest which the courts will protect.[2] It is as much a fraud for a man to place his property out of his hands for the purpose of avoiding the right of dower which is about to attach to it, as it is for a debtor who contemplates the contraction of debts to voluntarily dispose of his property in order to defeat the efforts of future creditors to secure their payment. The latter result, it is conceded, as elsewhere shown,[3] cannot be successfully accomplished.[4] The wife may in such cases maintain a bill in equity to reach the property fraudulently conveyed,[5] or she may, according to some of the cases, file a bill in chancery to recover her dower in the property as though no conveyance had ever been executed.[6]

§ 71. **Procedure in Federal tribunals.**—Statutes passed by State legislatures affecting rights of creditors, being local enactments and involving a rule of property, the Federal courts will adopt the construction which has been given to the statutes by the highest judicial tribunal of the State,[7] even though, were it an open question "depending upon the general principles of jurisprudence," the conclusion of the court might have been different.[8] A Federal court is bound to apply such a rule of property precisely as though it were sitting as a local court in the State; and this is true

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[1] Youngs v. Carter, 10 Hun (N. Y.) 194; Petty v. Petty, 4 B. Mon. (Ky.) 216.

[2] Mills v. Van Voorhies, 20 N. Y. 412; Simar v. Canaday, 53 N. Y. 298.

[3] See Chap. VI.

[4] See Savage v. Murphy, 34 N. Y. 508; Case v. Phelps, 39 N. Y. 164.

[5] Gilson v. Hutchinson, 120 Mass. 27; Petty v. Petty, 4 B. Mon. (Ky.) 215.

[6] See Brown v. Bronson, 35 Mich. 415; Jiggitts v. Jiggitts, 40 Miss. 718.

[7] Nichols v. Levy, 5 Wall. 443, 444; Sumner v. Hicks, 2 Black 532; Dundas v. Bowler, 3 McLean 397; Heydock v. Stanhope, 1 Curtis 471; Beach v. Viles, 2 Pet. 675. See Williams v. Kirtland, 13 Wall. 306; Ross v. M'Lung, 6 Pet. 283; Morse v. Riblet, 22 Fed. Rep. 501.

[8] Nichols v. Levy, 5 Wall. 443.

as to the observance of a State rule governing voluntary conveyances,[1] general assignments,[2] or sales rendered void for want of a change of possession.[3] And sometimes relief may be had in a Federal court where the jurisdiction of the State court would have proved imperfect.[4] Where a State court acquires possession and control over an insolvent debtor's property it has power to dispose of it and to give a good title. To this extent, as against a Federal court, the State law is a rule of property.[5] Where a creditor's suit is removed from a State court to a Federal court on the ground that the controversy is between citizens of different States, jurisdiction is not lost by admitting as plaintiffs other creditors who are citizens of the same State as the defendants.[6] As we have shown, the local law where the property has its *situs* governs in controversies to reach such property by creditors.[7] It may be here observed that leave to sue and defend *in forma pauperis* will be accorded to infants in the Federal courts, though a different rule prevailed in the State tribunals,[8] and that equity jurisdiction in the Federal courts is wholly independent of the local laws of the State, and is the same in its nature and extent in all the States; and that Federal courts are bound to proceed in equity causes according to the principles, rules, and usages which belong to the courts of chancery, as contradistinguished from common-law courts.[9]

[1] Lloyd v. Fulton, 91 U. S. 485.

[2] Parker v. Phetteplace, 2 Cliff. 70; Jaffray v. McGehee, 107 U. S. 364; Sumner v. Hicks, 2 Black 532.

[3] Allen v. Massey, 17 Wall. 351. See Howard v. Prince, 11 N. B. R. 327. As to supplementary proceedings in Federal courts, see § 61, n.

[4] See Gorrell v. Dickson, 26 Fed. Rep. 454.

[5] Burt v. Keyes, 1 Flipp. 62. See Wiswal v. Sampson, 14 How. 52; Williams v. Benedict, 8 How. 107; Payne v. Drewe, 4 East 523.

[6] Stewart v. Dunham, 115 U. S. 61.

[7] Spindle v. Shreve, 111 U. S. 542.

[8] Ferguson v. Dent, 15 Fed. Rep. 771. See Southworth v. Adams, 2 Flipp. 282, *in notis*.

[9] Gordon v. Hobart, 2 Sumner 405; Burt v. Keyes, 1 Flipp. 69, per Story, J.; McFarlane v. Griffith, 4 Wash. C. C. 585; Gaines v. Relf, 15 Pet. 9. See Green v. Creighton, 23 How. 90. A creditor having a standing in the Federal courts can contest the validity of a voluntary assignment, and a State law cannot deprive him of this right. Adler v. Ecker, 1 McCrary 257.

Questions as to appellate jurisdiction in Federal tribunals will be presently considered.[1]

§ 72. **Recapitulation.**—As regards the enforcement of a judgment against real property fraudulently conveyed a creditor then may be said to have three modes of obtaining satisfaction of his demand.

First. To obtain a decree of a court of equity declaring the conveyance fraudulent, setting it aside, and thereafter proceeding to sell the land on execution.

Second. By inserting in the decree in an equitable action, in addition to the provisions avoiding the transfer, a further clause appointing a referee to sell at public auction, and directing the debtor to unite in the conveyance; or a clause appointing a receiver and directing that the debtor convey the land to him and that he sell it.

Third. The creditor may sell the land on execution, and the purchaser may then set up the fraud in the debtor's conveyance, and if this is established, obtain a judgment entitling him to the possession of the land.[2]

The advantages incident to a judicious selection from these remedies in particular cases should not be overlooked.[3]

Stated in a form of more universal application, it is, as we have seen, a familiar and unquestioned doctrine of equity, that the court has power to aid a judgment-creditor to reach the property of his debtor, either by removing fraudulent judgments or conveyances which obstruct or defeat the plaintiff's remedy under the judgment, or by appropriating toward the satisfaction of the judgment rights or equitable interests of the debtor, which are not the subject of legal execution.[4]

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[1] See Chap. XXVII.

[2] Dawley v. Brown, 65 Barb. (N. Y.) 120.

[3] See Chap. XI.

[4] Robert v. Hodges, 16 N. J. Eq. 302.

CHAPTER IV.

STATUS OF ATTACKING CREDITORS.

§ 73. Rights of creditors at large.
74. Judgment conclusive as to indebtedness.
75. Creditor must have lien before filing bill.
76. Judgments sufficient.
77. Judgments insufficient.
78. Foreign judgments.
79. Creditors of a decedent.
80. Rule as to judgments in equitable actions.
81. Specific lien by attachment.
§ 82. Property of the debtor taken in name of third party.
83. When judgment is unnecessary.
84. Absconding and non-resident debtors.
85. Exceptional practice in Indiana and North Carolina.
86. Return of execution unsatisfied.
87. Distinction between realty and personalty as to issuance of execution.
88. Raising the objection.

"Courts of equity are not tribunals for the collection of debts."—*Webster* v. *Clark*, 25 Me. 314.

§ 73. **Rights of creditors at large.**—A creditor at large, commonly called a simple creditor, cannot assail as fraudulent against creditors, an assignment or transfer of property made by his debtor, until the creditor has first established his debt by the judgment of a court of competent jurisdiction, and has either acquired a lien upon specific property, or is in a situation to perfect a lien thereon and subject it to the payment of his judgment, upon the removal of the obstacle presented by the fraudulent assignment or transfer.[1] This principle is elementary.[2] A rule of procedure

[1] Southard v. Benner, 72 N. Y. 426. Compare Case v. Beauregard, 101 U. S. 688, and see Taylor v. Bowker, 111 U. S. 110; Briggs v. Oliver, 68 N. Y. 336. See § 52.

[2] Dodd v. Levy, 10 Mo. App. 122; Smith v. Railroad Co., 99 U. S. 401; Turner v. Adams, 46 Mo. 95; Crim v. Walker, 79 Mo. 335; Dawson v. Coffey, 12 Ore. 519; Baxter v. Moses, 77 Me. 465; Bassett v. St. Albans Hotel Co., 47 Vt. 314; Pendleton v. Perkins, 49 Mo. 565; Jones v. Green, 1 Wall. 330; Skeele v. Stanwood, 33 Me. 309; Meux v. Anthony, 11 Ark. 411; Webster v. Clark, 25 Me. 313; Voorhees v. How-

which allowed any prowling creditor, before his claim was definitely established by judgment, and without reference to the character of his demand, to file a bill to discover assets, or to impeach transfers, or interfere with the business affairs of the alleged debtor, it is asserted would manifestly be susceptible of the grossest abuse. A more powerful weapon of oppression could not be placed at the disposal of unscrupulous litigants. A creditor at large, having no lien or trust,[1] is not favored in the class of litigation under consideration,[2] and, generally speaking, has absolutely no status in court for the purpose of filing a creditor's bill.[3]

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ard, 4 Keyes (N. Y.) 371; Barrow v. Bailey, 5 Fla. 9; Burnett v. Gould, 27 Hun (N. Y.) 366; Reubens v. Joel, 13 N. Y. 488; Alnutt v. Leper, 48 Mo. 319; Mills v. Block, 30 Barb. (N. Y.) 552; Martin v. Michael, 23 Mo. 50; Public Works v. Columbia College, 17 Wall. 530; Kent v. Curtis, 4 Mo. App. 121; Tate v. Liggat, 2 Leigh (Va.) 84; Greenway v. Thomas, 14 Ill. 271; Fletcher v. Holmes, 40 Me. 364; Adsit v. Butler, 87 N. Y. 585; Taylor v. Bowker, 111 U. S. 110; Tyler v. Peatt, 30 Mich. 63; Tolbert v. Horton, 31 Minn. 520; Vasser v. Henderson, 40 Miss. 519; People's Savings Bank v. Bates, 120 U. S. 562; McKinley v. Bowe, 97 N. Y. 93; Webster v. Lawrence, 47 Hun (N. Y.) 566; Lichtenberg v. Herdtfelder, 33 Hun (N. Y.) 57; Bennett v. Stout, 98 Ill. 47; McAuliffe v. Farmer, 27 Mich. 76; Smith v. Millett, 12 R. I. 59; Ferguson v. Bobo, 54 Miss. 121; Claflin v. McDermott, 12 Fed. Rep. 375; Haggerty v. Nixon, 26 N. J. Eq. 42; Cropsey v. McKinney, 30 Barb. (N. Y.) 47; Stewart v. Fagan, 2 Woods 215; McMinn v. Whelan, 27 Cal. 300; Hunt v. Field, 9 N. J. Eq. 36; Robinson v. Stewart, 10 N. Y. 189; McDermott v. Blois, 1 R. M. Charlt. (Ga.) 281; Sturges v. Vanderbilt, 73 N. Y. 384; Evans v. Hill, 18 Hun (N. Y.) 464; Sexey v. Adkinson, 34 Cal. 346; Dahlman v. Jacobs, 15 Fed. Rep. 863; Miller v. Miller, 7 Hun (N. Y.) 208; Griffin v. Nitcher, 57 Me. 270. See *Ex parte* Boyd, 105 U. S. 653. Compare Case v. Beauregard, 101 U. S. 688, and see Taylor v. Bowker, 111 U. S. 110; Jones v. Green, 1 Wall. 330. In Alabama "a creditor without a lien may file a bill in chancery to subject to the payment of his debt any property which has been fraudulently transferred, or attempted to be fraudulently conveyed, by his debtor." Revised Code, § 3446. In construing this statute the court said that it was obviously the intention of the legislature to enlarge the jurisdiction of the court of chancery, and in cases where the simple and pure relationship of debtor and creditor existed to invest the creditor without a lien or a judgment with the privilege formerly confined to judgment-creditors. Reynolds v. Welch, 47 Ala. 200.

[1] Case v. Beauregard, 101 U. S. 688. Compare Manufacturing Co. v. Bradley, 105 U. S. 175.

[2] Herring v. New York, L. E. & W. R.R. Co., 63 How. Pr. (N. Y.) 502.

[3] Dunlevy v. Tallmadge, 32 N. Y. 459. But the simple contract creditor is not always without redress in cases

The possibility of a judgment will not suffice.[1] The rule is peremptory. "A court of equity never interposes," says Ruffin, C. J.,[2] "in behalf of a mere legal demand, until the creditor has tried the legal remedies, and found them ineffectual." It is not intended by this rule to exclude simple contract creditors from the operation of the statutes against fraudulent conveyances, they being, except perhaps as regards statutory liens, as much protected as creditors by judgment; but until such creditors have obtained a judgment and acquired a lien or a right to a lien upon the debtor's property, they are not in a position to assert their rights by a creditor's action.[3] It is observed by Brown, J., in Paulsen v. Van Steenbergh,[4] that "a court of equity is not the *forum* for litigating disputed claims, and, as a general rule, will not entertain an action or afford relief to a creditor until he has established his debt in a court of law."[5] Courts of equity are not tribunals for the collection of ordinary demands.[6] "The debt," said Field, J., "must be established by some judicial proceeding, and it must generally be shown that legal means for its collection have been exhausted."[7]

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where a fraudulent disposition of property has been made. An attachment or process in that nature may be secured against the fraudulent debtor, and the property improperly transferred, or any other property the debtor may have, can be seized under such provisional process and held pending the suit.

[1] Griffin v. Nitcher, 57 Me. 272. Compare Crompton v. Anthony, 13 Allen (Mass.) 36; Stephens v. Whitehead, 75 Ga. 297.

[2] Brown v. Long, 1 Ired. Eq. (N. C.) 193.

[3] Southard v. Benner, 72 N. Y. 426; Geery v. Geery, 63 N. Y. 256. See Frisbey v. Thayer, 25 Wend. (N. Y.) 396; National Bank of Rondout v. Dreyfus, 14 Weekly Dig. (N. Y.) 160.

[4] 65 How. Pr. (N. Y.) 342; Howe v. Whitney, 66 Me. 17; Taylor v. Bowker, 111 U. S. 110; Webster v. Clark, 25 Me. 313; Griffin v. Nitcher, 57 Me. 270.

[5] See Tasker v. Moss, 82 Ind. 62; Baxter v. Moses, 77 Me. 465.

[6] Webster v. Clark, 25 Me. 314. See Dunlevy v. Tallmadge, 32 N. Y. 457; Bownes v. Weld, 3 Daly (N. Y.) 253.

[7] Public Works v. Columbia College, 17 Wall. 530; Powell v. Howell, 63 N. C. 284; Fox v. Moyer, 54 N. Y. 128. Compare Case v. Beauregard, 101 U. S. 688. A creditor's bill may be filed

When a conveyance is said to be void or voidable against creditors the reference is to such parties when they are clothed with judgments and executions, *or such other titles* as the law has provided for the collection of debts.[1] Judge Bronson, in Noble v. Holmes,[2] after declaring that a fraudulent sale could not, under the provisions of the Revised Statutes of New York, be impeached by a creditor at large, added: "It must be a creditor having a judgment and execution, *or some other process which authorized a seizure of the goods.*" It may be urged that, where a debtor is manifestly guilty of fraudulent conduct with reference to his property, the prerequisites of a judgment and execution will prove serious impediments to an ordinary contract creditor who desires to take immediate action to reach the property which the debtor is dissipating or concealing. But the answer to this proposition has been that the remedy of a creditor so situated is not by creditor's bill; he must seek provisional relief by arrest or attachment, or both, in a suit founded upon his contract claim.[3] A creditor in this position is not, as we have seen, entitled to interfere by injunction before judgment with any contemplated alienation of property by the debtor,[4] even after instituting suit by attachment.[5] So stockholders cannot sue in the right of a corporation without first trying to set the body itself in motion;[6] and a creditor or member who desires to sue in place of a receiver must set forth that the receiver declines to proceed.[7]

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on a judgment at law, after execution, notwithstanding the recovery of another judgment on the judgment. Elizabethtown Savings Inst. v. Gerber, 34 N. J. Eq. 132, note; Bates v. Lyons, 7 Paige (N. Y.) 85.

[1] Per Denio, J., in Van Heusen v. Radcliff, 17 N. Y. 580; Gross v. Daly, 5 Daly (N. Y.) 545; McElwain v. Willis, 9 Wend. (N. Y.) 561.

[2] 5 Hill (N. Y.) 194.

[3] See Dodd v. Levy, 10 Mo. App. 121.

[4] Wiggins v. Armstrong, 2 Johns. Ch. (N. Y.) 145; Adler v. Fenton, 24 How. 411; Moran v. Dawes, Hopk. Ch. (N. Y.) 365. See § 52.

[5] Martin v. Michael, 23 Mo. 50.

[6] Taylor v. Holmes, 127 U. S. 492; Greaves v. Gouge, 69 N. Y. 157; Moore v. Schoppert, 22 W. Va. 291; Hawes v. Oakland, 104 U. S. 450.

[7] Fisher v. Andrews, 37 Hun (N. Y.) 180; Wait on Insol. Corps. § 100.

To recapitulate, then, the judgment and execution are necessary to a creditor before proceeding in equity—First, to adjudicate and definitely establish the legal demand, and save the debtor harmless from interference at the instigation of unconscionable claimants; second, to exhaust the legal remedy.[1]

The maxim, "*Lex neminem cogit ad vana seu inutilia peragenda*," has struggled for application in cases where it is manifest the judgment at law will be ineffectual or worthless,[2] but, though the sympathy of the profession seems to favor a relaxation of the rule requiring a judgment and execution before a proceeding by creditor's bill will lie, yet, generally speaking, the absence of a judgment proves fatal to such a bill.[3] A guarded statutory reform might be suggested with a view to enlarge the facilities of creditors to reach equitable assets. Complainants holding liquidated demands, founded upon written instruments or express contracts, might be given a right to proceed to attack transfers, against debtors who have made general assignments, or against whom unsatisfied judgments rest, or who have suspended business solely from lack of funds or have become notoriously insolvent.

§ 74. **Judgment conclusive as to indebtedness.**—In cases where fraud is established, the creditor does not claim *through* the debtor, but adversely to him, and by a paramount title, which overreaches and annuls the fraudulent conveyance or judgment by which the debtor himself would be estopped. It follows from the principles suggested, that a judgment obtained without fraud or collusion, and which concludes the debtor, whether rendered

[1] See Merchants' National Bank v. Paine, 13 R. I. 594.

[2] See Lichtenberg v. Herdtfelder, 33 Hun (N. Y.) 57, 60, dissenting opinion of Davis, P. J.; Case v. Beauregard, 101 U. S. 690; Hodges v. Silver Hill Mining Co., 9 Ore. 202; Turner v. Adams, 46 Mo. 95; Des Brisay v. Hogan, 53 Me. 554; Terry v. Anderson, 95 U. S. 636.

[3] See Taylor v. Bowker, 111 U. S. 110; Baxter v. Moses, 77 Me. 476; Jones v. Green, 1 Wall. 330.

upon default, by confession or after contestation, is, upon all questions affecting the title to his property, conclusive evidence against his creditors, to establish, first, the relation of creditor and debtor between the parties to the record, and secondly, the amount of the indebtedness. This principle is assumed in the New York statute in relation to creditors' bills,[1] and is so decided in Rogers v. Rogers.[2] The execution issued upon the judgment shows

[1] 2 R. S. 174, § 38.

[2] 3 Paige (N. Y.) 379. See 2 Greenl. Ev. 531; Marsh v. Pier, 4 Rawle (Pa.) 288; Candee v. Lord, 2 N. Y. 275; Decker v. Decker, 108 N. Y. 128; Mattingly v. Nye, 8 Wall. 373, and cases cited. But compare Teed v. Valentine, 65 N. Y. 471. Creditors may of course attack a collusive judgment when it is a fraud upon them. Lewis v. Rogers, 16 Pa. St. 18; Sidensparker v. Sidensparker, 52 Me. 481; Edson v. Cumings, 52 Mich. 52; Clark v. Douglass, 62 Pa. St. 416, per Sharswood, J.; Wells v. O'Connor, 27 Hun (N. Y.) 428. Compare Voorhees v. Seymour, 26 Barb. (N. Y.) 569; Meeker v. Harris, 19 Cal. 278; Thompson's Appeal, 57 Pa. St. 175; Clark v. Foxcroft, 6 Me. 298; Uhlfelder v. Levy, 9 Cal. 607. See especially Shaw v. Dwight, 27 N. Y. 244; Mandeville v. Reynolds, 68 N. Y. 545; Burns v. Morse, 6 Paige (N. Y.) 108; Whittlesey v. Delaney, 73 N. Y. 571. So the alienee from whom it is sought to recover property may show that the judgment is fraudulent and collusive (Collinson v. Jackson, 14 Fed. Rep. 309; S. C. 8 Sawyer, 357. See Freeman on Judgments, §§ 335–7), or that there is, in fact, no indebtedness (Clark v. Anthony, 31 Ark. 549; King v. Tharp, 26 Iowa 283; Esty v. Long, 41 N. H. 103), for judgments may be fraudulent as well as deeds. Carter v. Bennett, 4 Fla. 283; Decker v. Decker, 108 N. Y. 128. Finch, J., said: "It does not alter the character of this fraudulent arrangement, or enable it to defy justice, that it was accomplished through the agency of a valid judgment regularly enforced. That often may be made an effective agency in accomplishing beyond its own legitimate purpose a further result of fraud and dishonesty." Decker v. Decker, 108 N. Y. 128, 135. One who is in possession of property of the debtor transferred with intent to defraud creditors cannot defend himself on the ground that the debtor might have had a defense against the judgment had he chosen to assert it (Dewey v. Moyer, 9 Hun [N. Y.] 479); but confession of judgment by an administrator cannot deprive the grantee of his intestate of the defense of the statute of limitation. McDowell v. Goldsmith, 24 Md. 214. Then a decree confirming a conveyance of real estate from a husband to a wife in a suit between them, is not conclusive upon the husband's assignee in bankruptcy, seeking to annul the transfer as having been made in fraud of creditors. Humes v. Scruggs, 94 U. S. 22. Mr. Justice Hunt said in this case: "There would be little difficulty in making and sustaining fraudulent transfers of property, if the parties thereto could by a subsequent suit between themselves so fortify the deed that no others could attack it." See also Van Kleeck v. Miller, 19 N. B. R. 494. A debtor may attack a judgment as having been ob-

that the remedy afforded at law has been pursued, and of course is the highest evidence of the fact. The return shows whether the remedy has proved effectual or not, and, because of the embarrassments which would attend any other rule, the return is generally held conclusive. The court will not ordinarily entertain inquiries as to the diligence of the officer in endeavoring to find property upon which to levy.[1]

§ 75. **Creditor must have lien before filing bill.**—We must then accept the general rule that a court of equity will not interfere to enforce the payment of debts until the creditor has exhausted all the remedies known to the law to obtain satisfaction of the judgment. It is usually essential in order to give the court jurisdiction, and to reach equitable assets, that an execution should have been issued upon the judgment, and returned unsatisfied, or, if an action is brought in aid of an execution at law, that it be outstanding. The commencement of the action will then give the creditor a specific lien.[2] The rule that the legal remedy must be exhausted by the judgment-creditor before relief can be solicited to reach property not subject to the lien of the judgment is an ancient one. It existed in England, and was recognized by the Court of Chancery in New York, before the provisions made by the Revised Statutes[3] of that State, which require that an execution be issued and returned unsatisfied in whole or in part, before a bill can be filed to compel a discovery of property and to prevent a transfer of it. "This statute," says Chancellor Wal-

tained by fraud. Richardson v. Trimble, 38 Hun (N. Y.) 409. We may here state that the frauds which will sustain a bill to set aside a judgment or decree *between the parties* rendered by a court of competent jurisdiction are those which are extrinsic or collateral to the issues litigated. United States v. Throckmorton, 98 U. S. 61, and cases cited; Ross v. Wood, 70 N. Y. 9.

[1] Jones v. Green, 1 Wall. 332.

[2] Adsit v. Butler, 87 N. Y. 587; below, 23 Hun (N. Y.) 45; Crippen v. Hudson, 13 N. Y. 161; Beck v. Burdett, 1 Paige (N. Y.) 305; Dunlevy v. Tallmadge, 32 N. Y. 461.

[3] 2 N. Y. R. S. 174, § 38.

worth, in Child v. Brace,[1] "is only declaratory of a principle which had before been adopted in this court."[2] Hence the creditors of an insolvent partnership must acquire a legal or an equitable lien upon the property of the firm to authorize them to invoke the equitable powers of the court in its administration.[3] Nor does the fact that the debtor is an insolvent corporation, and has alienated its property in contravention of the statute, authorize a resort to equity until the remedy at law has been exhausted by judgment and execution returned unsatisfied.[4]

§ 76. **Judgments sufficient.**—An ordinary money-judgment rendered in the State in which the debtor resides and the concealed property is located, is manifestly a proper foundation for a creditor's suit. A bill of this character may also be filed "to aid in the collection of money decreed in chancery."[5] "I have no doubt, however," said Chancellor Walworth, "that a creditor, by a decree in chancery, upon the return of his execution unsatisfied, is entitled to the same relief, against the equitable rights and property of his debtor, as a creditor by a judgment at law."[6] A justice's judgment will suffice,[7] especially if docketed in a court of record.[8] And a judgment by confession, even though defective in form and particularity of statement, authorizes

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[1] 4 Paige (N. Y.) 309.

[2] See Dunlevy v. Tallmadge, 32 N. Y. 460; Adsit v. Butler, 87 N. Y. 587; Wiggins v. Armstrong, 2 Johns. Ch. (N. Y.) 144; Hendricks v. Robinson, 2 Johns. Ch. (N. Y.) 283; Brinkerhoff v. Brown, 4 Johns. Ch. (N. Y.) 671; Spader v. Davis, 5 Johns. Ch. (N. Y.) 280; S. C. on error, 20 Johns. (N. Y.) 554; Willetts v. Vandenburgh, 34 Barb. (N. Y.) 424; Crippen v. Hudson, 13 N. Y. 161; Brooks v. Stone, 19 How. Pr. (N. Y.) 396.

[3] Crippen v. Hudson, 13 N. Y. 161; Dunlevy v. Tallmadge, 32 N. Y. 457. See Greenwood v. Brodhead, 8 Barb. (N. Y.) 593; Young v. Frier, 9 N. J. Eq. 465.

[4] Adee v. Bigler, 81 N. Y. 349.

[5] Farnsworth v. Strasler, 12 Ill. 485; Weigtman v. Hatch, 17 Ill. 281.

[6] Clarkson v. De Peyster, 3 Paige (N. Y.) 320.

[7] Bailey v. Burton, 8 Wend. (N. Y.) 339; Newdigate v. Jacobs, 9 Dana (Ky.) 18; Heiatt v. Barnes, 5 Dana (Ky.) 220; Ballentine v. Beall, 4 Ill. 204.

[8] See Crippen v. Hudson 13 N. Y. 161.

the creditor to impeach a fraudulent transfer.[1] So does a demand classified and allowed by a probate court.[2] Under a judgment against joint debtors only part of whom were served with process, a creditor's action may be prosecuted to reach joint property, but not the separate property of those not served with process in the original suit.[3] Supplementary proceedings may be taken on a judgment so recovered, to reach joint property.[4]

§ 77. **Judgments insufficient.**—It seems clear in New York at least, that a creditor's action cannot be founded upon a judgment recovered in a justice's court where the execution had only been issued to, and returned by, the justice.[5] It should be docketed in, and made a judgment of, a court of record. It then becomes as much entitled to the aid of a court of equity as though originally recovered in a court of record.[6]

Again, a judgment in an attachment suit, where the defendant has not been brought into court so as to make it a personal judgment, is not evidence of the debt in another suit founded upon that record;[7] and a creditor's bill cannot be brought upon a judgment barred by the statute of limitations.[8] And an action based upon a judgment rendered against executors in their representative capacity, is not

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[1] Neusbaum v. Keim, 24 N. Y. 325. If a creditor attacks a confession of judgment as being fraudulent against him he must plead the grounds of the objection. A general averment will not suffice. Meeker v. Harris, 19 Cal. 278.

[2] Wright v. Campbell, 27 Ark. 637. Compare Catchings v. Manlove, 39 Miss. 671.

[3] Billhofer v. Heubach, 15 Abb. Pr. (N. Y.) 143. See Produce Bank v. Morton, 67 N. Y. 199. Compare Howard v. Sheldon, 11 Paige (N. Y.) 558; Commercial Bank of Lake Erie v. Meach, 7 Paige (N. Y.) 448.

[4] Perkins v. Kendall, 3 Civ. Proc. (N. Y.) 240.

[5] Crippen v. Hudson, 13 N. Y. 161. See Dix v. Briggs, 9 Paige (N. Y.) 595; Coe v. Whitbeck, 11 Paige (N. Y.) 42; Henderson v. Brooks, 3 T. & C. (N. Y.) 445.

[6] Bailey v. Burton, 8 Wend. (N. Y.) 339; Newdigate v. Jacobs, 9 Dana (Ky.) 18; Heiatt v. Barnes, 5 Dana (Ky.) 220; Ballentine v. Beall, 4 Ill. 204.

[7] Manchester v. McKee, 9 Ill. 520.

[8] Fox v. Wallace, 31 Miss. 660.

maintainable to set aside, as fraudulent as against creditors, a conveyance of real estate made by a decedent.[1] This latter case seems to result in a denial of justice. The court said that if the facts recited in the complaint were true it was the duty of the executors to reclaim the real estate. Earl, J., observed: "The fact that the fraudulent grantee is one of the executors furnishes no insurmountable obstacle. If she should refuse to restore the lands to the estate, she could be removed from her office of executrix, and then the remaining two executors could, under the act of 1858, disaffirm the conveyances of the real estate and bring an action to set them aside. Or the two executors could commence the action making the executrix a defendant, and in such an action obtain for the estate the relief demanded. If the two defendants refused to commence the action upon the application of the creditors or some of them, they could be compelled to commence it by an order of the surrogate." Parties experienced in suits instituted to annul fraudulent conveyances will readily appreciate the perfunctory manner in which these executors would be likely to prosecute their associate.

§ 78. **Foreign judgments.**—Usually a foreign judgment will not suffice as the foundation of a creditor's bill. In Buchanan v. Marsh,[2] which was an action in the courts of the State of Iowa on a judgment rendered in Canada, an injunction was asked restraining the defendants from alienating or encumbering their real estate until the rights of the parties should be determined at law. Wright, C. J., said: "Plaintiffs are not judgment-creditors. For the purpose of the present inquiry, their action is like any ordinary one upon a note, account, or any simple contract, or evidence of indebtedness. They have a foreign judgment; but until it becomes a judgment in our courts, they are no more than creditors at large, and until they obtain the

[1] Lichtenberg v. Herdtfelder, 103 N. Y. 302.

[2] 17 Iowa 494.

recognition of their claim by the adjudication of our State tribunals, they have no other or different rights as to the property of their debtor than if their demand was indorsed by a less solemn or conclusive proceeding or instrument. For, however effectual such judgment may be, or whatever the faith and credit to which it may be entitled, it is very certain that it cannot be enforced here until its validity is recognized and passed upon by the judgment of our courts. This being so upon common-law principles, we know of no principle upon which plaintiffs were entitled to this injunction. The rule is, as far as we know, without exception, that the creditor must have completed his title at law, by judgment (if not by execution) before he can question the disposition of the debtor's property." The weight of authority sustains this view.[1] On the other hand, upon a judgment recovered in Pennsylvania, an attachment was issued in New Jersey, and the lien thereby created was held to be sufficient to enable the creditor to attack a fraudulent transfer.[2] Again, in Wilkinson v. Yale,[3] a creditor's bill was maintained in the United States Circuit Court, founded upon a judgment of a court of the State in which the Federal court was sitting.[4] Still the general rule is that a foreign judgment ranks as a simple contract debt; it does not have the force and operation of a domestic judgment

[1] See McCartney v. Bostwick, 31 Barb. (N. Y.) 390, overruled 32 N. Y. 53; Claflin v. McDermott, 12 Fed. Rep. 375; Davis v. Bruns, 23 Hun (N. Y.) 648; Berryman v. Sullivan, 21 Miss. 65; Tarbell v. Griggs, 3 Paige (N. Y.) 207; Farned v. Harris, 19 Miss. 366; Davis v. Dean, 26 N. J. Eq. 436; Crim v. Walker, 79 Mo. 335.

[2] Smith v. Muirheid, 34 N. J. Eq. 4. See Watkins v. Wortman, 19 W. Va. 79.

[3] 6 McLean 16. See Bullitt v. Taylor, 34 Miss. 708.

[4] But compare Tompkins v. Purcell, 12 Hun (N.Y.) 664; Tarbell v. Griggs, 3 Paige Ch. (N. Y.) 208; Steere v. Hoagland, 39 Ill. 264; Bullitt v. Taylor, 34 Miss. 708, 743; Brown v. Bates, 10 Ala. 440; Goodyear Dental Vulcanite Co. v. Frisselle, 22 Hun (N. Y.) 174; Crim v. Walker, 79 Mo. 335; Claflin v. McDermott, 12 Fed. Rep. 375. It would seem from perusing these cases that the jurisdiction to proceed in a State court upon a Federal judgment is problematical.

except for the purposes of evidence, beyond the jurisdiction in which it is obtained.[1]

§ 79. **Creditors of a decedent.**—The question of the necessity of a judgment as the foundation of a creditor's proceedings, in cases where the debtor is dead, has created much dissension in the courts. Estes v. Wilcox,[2] an important case in the New York Court of Appeals, is to the effect that a creditor without judgment and execution returned, cannot maintain an action to enforce a resulting trust under the statutes of uses and trusts, in lands purchased and paid for by the debtor, and deeded to another, although the debtor died insolvent. It was held that these facts did not dispense with the observance of the general rule that a debt must be fixed and ascertained by judgment, and the legal remedies exhausted.[3] It is contended that the reason of the rule that a creditor's debt must be ascertained by judgment before proceeding in equity, does not necessarily fail by the death of the debtor before judgment recovered upon the debt. The creditor may prosecute the claim to judgment against the personal representatives of the debtor, and, although it will not be conclusive against his heirs or his grantees by title acquired before his death, it would conclude the creditor as to the amount of his claim.[4] But we cannot discover that the judgment against the personal representatives would be of much worth to the creditor.[5] This case certainly extends the requirement to an extreme limit.[6] The correctness of this rule is not uniformly conceded, and in a number of States the princi-

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[1] McElmoyle v. Cohen, 13 Pet. 312.

[2] 67 N. Y. 264.

[3] See Allyn v. Thurston, 53 N. Y. 622; Fox v. Moyer, 54 N. Y. 129; Shaw v. Dwight, 27 N. Y. 249; North American Fire Ins. Co. v. Graham, 5 Sandf. (N. Y.) 200; Jones v. Green, 1 Wall. 332, per Justice Field; Chittenden v. Brewster, 2 Wall. 196. See also § 73.

[4] Estes v. Wilcox, 67 N. Y. 266; Burnett v. Gould, 27 Hun (N. Y.) 366.

[5] Lichtenberg v. Herdtfelder, 103 N. Y. 302.

[6] See Merchants' Nat. Bank v. Paine, 13 R. I. 594.

ple is asserted that no proof of the recovery of judgment is necessary where the debtor is dead,[1] as the judgment would be useless and unmeaning.[2] In Hagan v. Walker,[3] Mr. Justice Curtis, a very learned and able jurist, held that a simple creditor might maintain a suit to remove a covinous conveyance and reach assets, against the administrator and the fraudulent alienee of a deceased debtor. The court was of opinion that such a case was not to be treated as an application by a judgment-creditor for the exercise of the ancillary jurisdiction of the court to aid him in executing legal process, but came under the head of original jurisdiction in equity.[4] The authorities upon this subject cannot be reconciled. The best reasoning would seem to be with the cases holding that no judgment need be recovered against the decedent's estate, and in favor of allowing the creditor both to establish his claim, and to discover assets to be applied toward its payment, in the same action. The practice of allowing executors and administrators to prosecute actions to annul fraudulent transfers, in the interest and right of creditors, will be noticed presently. Where the personal representatives sue the necessity for judgment and execution returned unsatisfied is superseded.[5]

§ 80. Rule as to judgments in equitable actions.—The remedy, it seems, must also be exhausted where the judgment proceeded upon was rendered in an equity suit.

[1] Johnson v. Jones, 79 Ind. 141; Kipper v. Glancey, 2 Blackf. (Ind.) 356; O'Brien v. Coulter, 2 Blackf. (Ind.) 421; Spencer v. Armstrong, 12 Heisk. (Tenn.) 707; Love v. Mikals, 11 Ind. 227; Spicer v. Ayers, 2 T. & C. (N. Y.) 628; Reeder v. Speake, 4 S. C. 293; Haston v. Castner, 29 N. J. Eq. 536; Offutt v. King, 1 MacA. (D. C.) 314; Fowler's Appeal, 87 Pa. St. 449; Shurts v. Howell, 30 N. J. Eq. 418; Phelps v. Platt, 50 Barb. (N. Y.) 430.

[2] Platt v. Mead, 9 Fed. Rep. 96; Loomis v. Tifft, 16 Barb. (N. Y.) 541 (*contra*, Estes v. Wilcox, 67 N. Y. 264); Doran v. Simpson, 4 Ves. 651; Alsager v. Rowley, 6 Ves. 749; Wright v. Campbell, 27 Ark. 637.

[3] 14 How. 32.

[4] See Green v. Creighton, 23 How. 106; Bay v. Cook, 31 Ill. 336; Merry v. Fremon, 44 Mo. 518; Snodgrass v. Andrews, 30 Miss. 472. Compare Hills v. Sherwood, 48 Cal. 386.

[5] Barton v. Hosner, 24 Hun (N. Y.) 471. See §§ 112, 113.

Thus in Geery v. Geery,[1] which was an action brought to set aside conveyances of real estate alleged to have been made by the defendant, through other persons, to his wife, in fraud of creditors, there was no proof of the docketing of a judgment, and of execution returned unsatisfied, and the point was taken that the ordinary remedy usually available to creditors had not been exhausted. The creditor sought to obviate this objection by urging that the rule did not apply where the judgment sought to be collected was rendered in an equitable action. It appeared that the foundation of the complainant's claim was a judgment rendered upon a partnership accounting, but the judgment had not been docketed, nor had any execution been issued upon it. Earl, J., said: "I can perceive no reason for a distinction. A suit in equity to enforce satisfaction of a judgment should not be allowed so long as there is a more simple and obvious remedy. The statute law gives a remedy by execution, and that remedy, upon every reason of public policy and convenience, should be exhausted before a new suit should be allowed to be maintained."[2] Then Johnson, J., observed, in Crippen v. Hudson,[3] that "the court of chancery required executions to be returned unsatisfied, when issued on its own decrees, before it would entertain creditors' bills founded upon them."[4] There is, however, a rule running through some of the cases to the effect that where the claim asserted is purely equitable, and such as a court of equity will take cognizance of in the first instance, equity will at the same time go to the extent of inquiring into the matter of obstructions which have been placed in the way of enforcing the demand.[5] For instance,

[1] 63 N. Y. 252; overruling White v. Geraerdt, 1 Edw. Ch. (N. Y.) 336.

[2] See *supra*, §§ 76, 77. Clarkson v. De Peyster, 3 Paige (N. Y.) 320; S. P. Adsit v. Butler, 87 N. Y. 585–589.

[3] 13 N. Y. 161.

[4] See North Am. Fire Ins. Co. v. Graham, 5 Sandf. (N. Y.) 198; Speiglemyer v. Crawford, 6 Paige (N. Y.) 254.

[5] Halbert v. Grant, 4 Mon. (Ky.) 583. Compare Shea v. Knoxville & Kentucky R.R. Co., 6 Baxter (Tenn.) 277.

where a surety has paid money for a principal, chancery has jurisdiction of a suit for its recovery, and the complainant may add a prayer seeking to annul a fraudulent conveyance that stands in the way of a settlement or is calculated to defeat or embarrass the remedial action of the court.[1]

§ 81. **Specific lien by attachment.**—In cases where the sheriff takes property upon attachment which is subject to seizure and sale, but which has been fraudulently transferred, it seems that the plaintiff, after the service of the attachment, is not a mere creditor at large, but, according to some of the authorities, one having a specific lien upon the goods attached, and that the sheriff has a like lien, and the right to show, as a defense to an action for taking the property, that the title of the party claiming it is fraudulent as against the attaching creditor.[2] Hence it was held, in an action brought by a general assignee for the benefit of creditors, to recover goods seized by a sheriff on a warrant of attachment issued against the assignor, that it was permissible for the sheriff to show that the assignment was fraudulent and void as against the attaching creditors.[3] There is some confusion, however, in the authorities on the question of the right of an attaching creditor to attack fraudulent transfers. The Supreme Court of Nebraska and the courts of some other States deny such right in a variety of instances.[4] The Nebraska case is rested upon the authority of Brooks v. Stone,[5] which proceeds on the

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[1] Waller v. Todd, 3 Dana (Ky.) 508. Compare Smith v. Rumsey, 33 Mich. 184; especially, Swan v. Smith, 57 Miss. 548. But see § 85.

[2] Gross v. Daly, 5 Daly (N. Y.) 542; Rinchey v. Stryker, 28 N. Y. 45; S. C. 26 How. Pr. 75; Noble v. Holmes, 5 Hill (N. Y.) 194; Van Etten v. Hurst, 6 Hill (N. Y.) 311; Sheafe v. Sheafe, 40 N. H. 516; Webster v. Lawrence, 47 Hun (N. Y.) 565.

[3] Carr v. Van Hoesen, 26 Hun (N. Y.) 316. Compare Bates v. Plonsky, 28 Hun (N. Y.) 112.

[4] Weil v. Lankins, 3 Neb. 384; Tennent v. Battey, 18 Kan. 324; Martin v. Michael, 23 Mo. 50; Greenleaf v. Mumford, 19 Abb. Pr. (N. Y.) 469; Mills v. Block, 30 Barb. (N. Y.) 549; Melville v. Brown, 16 N. J. Law 364; McMinn v. Whelan, 27 Cal. 300.

[5] 19 How. Pr. (N. Y.) 395.

theory that the creditor's remedy at law is not exhausted, his claim is not established, and perhaps he will never get a judgment.[1] So garnishment process does not create a sufficient lien to uphold a creditor's bill.[2] In New York, a State in which the authorities relating to the different phases of our subject are burdened with subtle distinctions, it is said that an attaching creditor could not maintain an independent action in the nature of a creditor's bill to set aside a fraudulent transfer of a chose in action.[3] This case rests upon the theory that the attachment, owing to the nature of the property, created no lien; but, where a lien is in fact acquired, the rule, as already stated, seems to be different,[4] especially when the attaching creditor is a defendant, at the suit of the fraudulent alienee, and relief will be in some instances extended, both in that State and in sister States, for the vindication of the lien.[5] In Bowe v. Arnold[6] the courts of New York held that the plaintiffs, in an action instituted by attachment, could not join with the sheriff in a suit against an assignee claiming the property under an assignment which it was sought to set aside in the action as fraudulent. It was conceded that such parties might join in that State,[7] in actions to collect debts, effects, or choses in action attached by the sheriff,[8] but the court observed that this was not such a case. The counsel

[1] Compare Jones v. Green, 1 Wall. 331. See § 73.

[2] Bigelow v. Andress, 31 Ill. 322.

[3] Thurber v. Blanck, 50 N. Y. 80.

[4] Carr v. Van Hoesen, 26 Hun (N. Y.) 316; Rinchey v. Stryker, 28 N. Y. 45. Compare Frost v. Mott, 34 N. Y. 255; Smith v. Longmire, 24 Hun (N. Y.) 257; Hall v. Stryker, 27 N. Y. 596; Castle v. Lewis, 78 N. Y. 131; Ocean Nat. Bank v. Olcott, 46 N. Y. 12; Deutsch v. Reilly, 57 How. Pr. (N. Y.) 75.

[5] Heyneman v. Dannenberg, 6 Cal. 378; Scales v. Scott, 13 Cal. 76; Joseph v. McGill, 52 Iowa 128; Heye v. Bolles, 33 How. Pr. (N. Y.) 266; Merriam v. Sewall, 8 Gray (Mass.) 316; Falconer v. Freeman, 4 Sandf. Ch. (N. Y.) 565; Stone v. Anderson, 26 N. H. 506; Dodge v. Griswold, 8 N. H. 425; Hunt v. Field, 9 N. J. Eq. 36; Williams v. Michenor, 11 N. J. Eq. 520; Sheafe v. Sheafe, 40 N. H. 516.

[6] 18 Weekly Dig. (N. Y.) 326; s. c. 31 Hun (N. Y.) 256; affi'd 101 N. Y. 652.

[7] See N. Y. Code Civ. Pro. §§ 655–667.

[8] Compare Thurber v. Blanck, 50 N. Y. 86; Lynch v. Crary, 52 N. Y. 183.

sought, upon the authority of Bates v. Plonsky,[1] to maintain the action as being instituted for the protection, preservation, and enforcement of the lien obtained by the supposed levy of the attachment, but the court said that the precedent cited was a suit of a different nature, and was prosecuted merely to enjoin the distribution of a fund until the rights of the conflicting claimants could be established. It is observed in the course of the opinion that a creditor could only file a bill to annul a fraudulent transfer after return of execution unsatisfied,[2] or in aid of the execution after the recovery of a judgment.[3]

The judgment in this case is undoubtedly correct, but in view of the other authorities cited, it can scarcely be considered as leaving the law of that State relative to the rights of an attaching creditor in a very clear or satisfactory condition. We deny that a mere attaching creditor can, under any correct theory of law, become an actor in a creditor's suit. Indeed the underlying principles of the cases in which it is sought to make a lien acquired by the provisional remedy of attachment the practical equivalent of a lien procured by final judgment, are subversive of the time-honored policy and rule of the courts, that a creditor's bill must be founded upon a definite claim, established by a judgment at law.[4] If the innovations in modern procedure call for the abrogation of this old chancery practice, it should not be superseded by indirection, but deliberately, and by some carefully formulated legislative substitute. The requirement is neither artificial nor technical; it is a necessary protection and safeguard to the debtor. Manifestly, where the property in controversy is of such character as not to be susceptible to an attachment lien, the attaching creditor cannot, either as plaintiff or defendant,

[1] 28 Hun (N. Y.) 112.

[2] See Chatauque Co. Bank v. Risley, 19 N. Y. 370; Cole v. Tyler, 65 N. Y. 73; Ballou v. Jones, 13 Hun (N. Y.) 629.

[3] See Adsit v. Butler, 87 N. Y. 585.

[4] See § 73.

avoid or attack any alienation or disposition that may have been made of it; he has no status and no lien. Where, however, an attachment lien has been actually acquired, and the officer or attaching creditor is made defendant in a suit by the fraudulent alienee, the efficacy of the lien may be vindicated by setting up the fraud by way of defense, because the plaintiff will be forced to recover upon the strength of his own title, and if it be shown that such title is affected with fraud as regards the defendant or attaching creditor, the plaintiff will fail to make out a good title.

§ 82. **Property of the debtor taken in name of third party.**— The rules of procedure in cases where property has been paid for by the debtor, but the title taken in the name of third parties, have already been noticed.[1] The New York Court of Appeals, in The Ocean National Bank v. Olcott,[2] said, ill-advisedly as we think, that it was difficult to perceive the reason for any distinction between the rights of creditors as to the property fraudulently transferred by the debtor personally, and property paid for by him and transferred by the vendor or grantor to a third person. "Why," said Chief-Justice Church, "should creditors have different and superior rights to enforce their debts, in the latter case, to those enjoyed in the former? I can see no reason for any distinction, and I do not believe the statute has created any. But, in either case, the commencement of an equitable action is necessary to constitute a lien or charge, in any legal sense, upon the land. . . . . The harmony and analogies of the law are better preserved by requiring all available legal remedies to be resorted to, as a preliminary requisite to an action for the application of the trust property." In Ohio it is said that the statute[3] does not apply to cases where the title is taken in the name of a third party for the

[1] See § 57.
[2] 46 N. Y. 22.
[3] Swan & Sayler's Stats. 397, regulating the mode of administering assignments in trust for the benefit of creditors.

reason that the avoidance of the conveyance merely leaves the title in the grantor, which, of course, does not benefit the creditor;[1] such an interest it is argued must be reached by a creditor's bill.[2] It cannot be sold on execution.[3] This question arose in Spaulding v. Fisher.[4] It was held that property purchased with the funds of the debtor, though taken in the name of a third party, was the property of the debtor as regards his creditors. The court said: "Its fraudulent transfer and concealment is equally established, whether the transfer is directly from the debtor or from another by his direction and procurement, the property transferred having been purchased with his funds. The object of the statute is to afford a remedy to the creditor against any one to whom the property of his debtor, no matter in what it consisted, or how situated, has been fraudulently transferred for the purpose, and with the intent on the part of the debtor transferring, and the individual receiving such transfer, to conceal the same, so as 'to secure it from the creditors and prevent its attachment or seizure on execution.'"[5]

§ 83. **When judgment is unnecessary.**—It has been decided, though the question is a debatable one, that in special cases, if the execution cannot be issued in the State in which the land lies, it will suffice if issued in the State of the debtor's residence;[6] and if the debtor's property is in the hands of a receiver appointed by the court, so that a

[1] Shorten v. Woodrow, 34 O. S. 645.

[2] Bomberger v. Turner, 13 O. S. 263. See Martin v. Elden, 32 O. S. 282. Compare Combs v. Watson, 32 O. S. 228.

[3] Garfield v. Hatmaker, 15 N. Y. 475.

[4] 57 Me. 415. See § 57.

[5] In Massachusetts, until the St. of 1844, c. 107, took effect, land paid for and occupied by a debtor, the legal title to which had never been in him, but had been conveyed to another person in order to secure it from his creditors, could not be attached or taken on execution as his property. Hamilton v. Cone, 99 Mass. 478; Howe v. Bishop, 3 Met. (Mass.) 26. See, also, Garfield v. Hatmaker, 15 N. Y. 475; Webster v. Folsom, 58 Me. 230. Compare Guthrie v. Gardner, 19 Wend. (N. Y.) 414.

[6] McCartney v. Bostwick, 32 N. Y. 53.

levy cannot be made, levy is excused;[1] and where, by reason of special circumstances, the creditor has no remedy at law, it has been argued that the legal remedy cannot be exhausted before proceeding in equity.[2] McCartney v. Bostwick[3] seems to be in its general statements overruled by Estes v. Wilcox;[4] at least the courts have so held.[5] A distinction is drawn in McCartney v. Bostwick between property fraudulently alienated by the debtor, and property paid for by him and taken in the name of a third party. In the former instance, the proceeding is to remove impediments in the way of reaching the *debtor's* property; in the latter, it is to charge with a statutory lien the property of a *third party*, which the debtor never owned; in the one case, it is to exercise auxiliary jurisdiction in aid of legal process; in the other to enforce a trust of which the courts of law have no jurisdiction. We have already shown that Chief-Justice Church, in a later case, could see no reason for this distinction.[6] In a controversy which arose in Georgia, it was decided that where a creditor of an insolvent estate was under injunction not to sue the executor, this constituted a good excuse for not obtaining judgment on his debt before proceeding by bill in equity to cancel a voluntary conveyance made by the testator in his lifetime.[7] The court in this case seemed determined to favor the creditor, for it was held that if, during the pendency of the bill, a judgment or decree establishing the amount of the debt was obtained against the executor, it might be brought into the bill by way of amendment, and used as effectively

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[1] Stewart v. Beale, 7 Hun (N. Y.) 405. This case contains an important review of the authorities, and is affirmed without an opinion in the Court of Appeals. See 68 N. Y. 629. See also Adsit v. Sanford, 23 Hun (N. Y.) 49.

[2] Kamp v. Kamp, 46 How. Pr. (N. Y.) 143, overruled in other respects, 59 N. Y. 212. See § 80.

[3] 32 N. Y. 53..

[4] 67 N. Y. 264.

[5] Evans v. Hill, 18 Hun (N. Y.) 465.

[6] The Ocean National Bank v. Olcott, 46 N. Y. 22. See § 82.

[7] Compare Shellington v. Howland, 53 N. Y. 371.

as if the adjudication had preceded the filing of the bill, and had been originally alleged therein.[1] Where the performance of a condition becomes impossible or illegal, performance is excused.[2] So in some States creditors may proceed against an insolvent estate without the return of an execution.[3] In Case v. Beauregard,[4] Mr. Justice Strong observed: "But, after all, the judgment and fruitless execution are only evidence that his legal remedies have been exhausted, or that he is without remedy at law. They are not the only possible means of proof. The necessity of resort to a court of equity may be made otherwise to appear. Accordingly the rule, though general, is not without many exceptions. Neither law nor equity requires a meaningless form, '*Bona, sed impossibilia non cogit lex.*' It has been decided that where it appears by the bill that the debtor is insolvent and that the issuing of an execution would be of no practical utility, the issue of an execution is not a necessary prerequisite to equitable interference.[5] This is certainly true where the creditor has a lien or a trust in his favor."[6] Still the observations of Mr. Justice Strong are not being accorded hearty approval even in the Supreme Court itself.[7] In Russell v. Clark,[8] Chief-Justice Marshall, in discussing the general subject, said: "If a claim is to be satisfied out of a fund, which is accessible

[1] Cleveland v. Chambliss, 64 Ga. 352.

[2] Shellington v. Howland, 53 N. Y. 374; Cohen v. N. Y. Mutual Life Ins. Co., 50 N. Y. 610; Semmes v. Hartford Ins. Co., 13 Wall. 158.

[3] Steere v. Hoagland, 39 Ill. 264; McDowell v. Cochran, 11 Ill. 31; Bay v. Cook, 31 Ill. 336; Hagan v. Walker, 14 How. 32; Merry v. Fremon, 44 Mo. 518; Haston v. Castner, 29 N. J. Eq. 536; Johnson v. Jones, 79 Ind. 141; Platt v. Mead, 9 Fed. Rep. 96. Compare Crompton v. Anthony, 13 Allen (Mass.) 36; Wright v. Campbell, 27 Ark. 637. See § 79.

[4] 101 U. S. 690.

[5] Citing Turner v. Adams, 46 Mo. 95; Postlewait v. Howes, 3 Ia. 365; Ticonic Bank v. Harvey, 16 Ia. 141; Botsford v. Beers, 11 Conn. 369; Payne v. Sheldon, 63 Barb. (N. Y.) 169. See Fink v. Patterson, 21 Fed. Rep. 609.

[6] See Austin v. Morris, 23 S. C. 403.

[7] Taylor v. Bowker, 111 U. S. 110; People's Savings Bank v. Bates, 120 U. S. 556. Compare Thompson v. Van Vechten, 27 N. Y. 568, 582; Baxter v. Moses, 77 Me. 476; Jones v. Green, 1 Wall. 330.

[8] 7 Cranch 89.

only by the aid of a court of chancery, application may be made, in the first instance, to that court, which will not require that the claim should be first established in a court of law."[1] Then, as we shall presently see,[2] in cases where the statute gives a new remedy in favor of creditors at large, by giving to an assignee or trustee for their benefit a statutory right to property conveyed in fraud of creditors, this statutory right takes the place of the specific lien required by law as a condition of the right of individual creditors to contest the validity of the transfers.[3]

§ 84. **Absconding and non-resident debtors.**—The fact that the debtor is a non-resident, and has no property within the State, is not proof that all the legal remedies have been exhausted.[4] If he has fraudulently alienated real property within the State, his interest, whatever it may be, must be first reached by attachment.[5] Where, however, the debtor has absconded so that no personal judgment can be obtained against him, and there is no statutory proceeding by which his property can be reached, it has been held that a creditor's bill will lie in the first instance, and from the necessity of the case.[6] It is considered as analogous to a proceeding to reach and subject the equities of a deceased debtor to the claims of creditors, or to satisfy a debt from a specific equitable fund, as to enforce a lien, in neither of which cases is a personal judgment required.[7] A full review of the authorities upon this question may be found in Merchant's National Bank v.

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[1] See Shufeldt v. Boehm, 96 Ill. 563; Steere v. Hoagland, 39 Ill. 264.

[2] See Chap. VII.

[3] Southard v. Benner, 72 N. Y. 427; Barton v. Hosner, 24 Hun (N. Y.) 471; Cady v. Whaling, 7 Biss. 430; Cragin v. Carmichael, 2 Dillon 520; Platt, Assignee, v. Matthews, 10 Fed. Rep. 280.

[4] Ballou v. Jones, 13 Hun (N. Y.) 631.

[5] Dodd v. Levy, 10 Mo. App. 121; Greenway v. Thomas, 14 Ill. 272. *Contra*, Anderson v. Bradford, 5 J. J. Marsh (Ky.) 69; Scott v. McMillen, 1 Litt. (Ky.) 302.

[6] See Turner v. Adams, 46 Mo. 95.

[7] Pendleton v. Perkins, 49 Mo. 565. Compare O'Brien v. Coulter, 2 Blackf. (Ind.) 421; Russell v. Clark, 7 Cranch 89, per Chief-Justice Marshall. See § 79.

Paine,[1] an important and well-considered case. The court there maintain the right of a creditor, before the recovery of judgment, to file a bill to reach equitable assets where the absconding debtor had left no legal assets liable to attachment,[2] and cite in support of their conclusion cases from Kentucky,[3] Virginia,[4] Indiana,[5] South Carolina,[6] and Missouri,[7] and adopt the views of the Supreme Court of Missouri, already quoted.

§ 85. **Exceptional practice in Indiana and North Carolina.** —In Indiana a novel practice as to joinder of claims prevails. Thus a claim to cancel a conveyance of real property from a husband to his wife, as being fraudulent against creditors, may be united with a demand against the husband arising out of contract.[8] Then in an action against a husband and wife, instituted to obtain judgment against the husband for the price of goods sold, a fraudulent conveyance from the husband to the wife may be set aside so as to let in the lien of the judgment when recovered.[9] It should be observed that this practice is wholly at variance with the prevalent rule that only judgment-creditors can attack fraudulent transfers.[10] Nevertheless its technical correctness seems to be recognized in North Carolina. There the court declare it obvious that the rule exacting the recovery of a judgment at law before proceeding in equity grew out of the relations of the two courts under the former system, one acting as an aid to the other,

[1] 13 R. I. 592.

[2] Scott v. McMillen, 1 Litt. (Ky.) 302. Compare Russell v. Clark's Exrs., 7 Cranch 69, 89; Miller v. Davidson, 8 Ill. 518, 522; Greenway v. Thomas, 14 Ill. 271; Anderson v. Bradford, 5 J. J. Marsh (Ky.) 69; Meux v. Anthony, 11 Ark. 411. See Turner v. Adams, 46 Mo. 95, 99; McDermutt v. Strong, 4 Johns. Ch. (N. Y.) 687, 689.

[3] Scott v. McMillen, 1 Litt. (Ky.) 302.

[4] Peay v. Morrison's Exrs., 10 Gratt. (Va.) 149.

[5] Kipper v. Glancey, 2 Blackf. (Ind.) 356; O'Brien v. Coulter, 2 Blackf. (Ind.) 421.

[6] Farrar v. Haselden, 9 Rich. Eq. (S. C.) 331.

[7] Pendleton v. Perkins, 49 Mo. 565.

[8] Lindley v. Cross, 31 Ind. 106.

[9] Frank v. Kessler, 30 Ind. 8.

[10] See Mills v. Block, 30 Barb. (N.Y.) 549. See § 73.

and that it was essential to the harmony of their action in the exercise of their separate functions in the administration of the law. Chief-Justice Smith continuing, said: "It must of necessity cease to have any force, when the powers of both, and the functions of each, are committed to a single tribunal, substituted in place of both. Why should a plaintiff be compelled to sue for and recover [judgment on] his debt, and then to bring a new action to enforce payment out of his debtor's property in the very court that ordered the judgment? Why should not full relief be had in one action, when the same court is to be called on to afford it in the second? The policy of the new practice, and one of its best features, is to furnish a complete and final remedy for an aggrieved party in a single court, and without needless delay or expense."[1] This method of procedure constitutes a startling innovation. New York, the birthplace and stronghold of the reformed procedure, clings tenaciously to the old practice of requiring a judgment and execution before an appeal can be made to the equity side of the court. Not only has the rule been rigidly enforced in that State, but, as is shown elsewhere, it has been extended and strengthened.[2] The rule has been relaxed in other States, but the cases which completely subvert or overturn it are comparatively few. The old method of procedure did not result, as the court supposed in Bank v. Harris,[3] wholly from the relation of courts of law to courts of equity, nor is the necessity for its observance abrogated by the amalgamation of these jurisdictions.

[1] Bank v. Harris, 84 N. C. 210. Claims for judgment upon coupons and for a mandamus to coerce payment were joined. McLendon v. Commissioners of Anson, 71 N. C. 38. So it was held competent to proceed in the same action against an insolvent debtor bank and against stockholders upon their individual liabilities under the charter. Glenn v. Farmers' Bank, 72 N. C. 626.

[2] See Estes v. Wilcox, 67 N. Y. 264; Burnett v. Gould, 27 Hun (N. Y.) 366; Crippen v. Hudson, 13 N. Y. 161; Adee v. Bigler, 81 N. Y. 349. See §§ 79, 80.

[3] 84 N. C. 210.

If the creditor is to be allowed to prove and recover judgment upon his simple demand, and cancel fraudulent conveyances, or reach equitable assets in the same action, it would seem to follow that the usual incidents of a creditor's suit would attach to the proceeding. The creditor in an action for assault and battery, libel, or slander,[1] might apply for an injunction against the debtor, or for a receiver of his property, or embarrass him by filing a *lis pendens*. The time-honored rule that the debtor's management and control of his property should not be interfered with by injunction or otherwise, before judgment, would be uprooted,[2] and an unscrupulous creditor, having only the faintest shadow of a claim, could work out the debtor's financial destruction. The ancient practice must not be regarded as technical or artificial, but as a safeguard to the debtor dictated alike by reason and necessity. If the practice is to undergo a change, as seems likely in some States, then the joinder should be limited to cases of liquidated demands of creditors, certain in their character, and provisional relief should be withheld. The union is calculated to crowd into a single action a multitude of complicated issues concerning distinct transactions, as to the debt and the facts attending the alienation, a result always to be deprecated; and would necessitate the presence of the alleged fraudulent vendee in the action.[3]

§ 86. **Return of execution unsatisfied.**—A cloud of cases may be cited to the general effect that, to reach personal property or equitable assets, by bill, a creditor must first secure the return of an execution unsatisfied[4] unless it can

[1] See § 90.

[2] See § 52.

[3] See § 131.

[4] Morgan v. Bogue, 7 Neb. 429; Castle v. Bader, 23 Cal. 76; Newman v. Willetts, 52 Ill. 98; Brown v. Bank of Mississippi, 31 Miss. 454; McElwain v. Willis, 9 Wend. (N. Y.) 548; Hogan v. Burnett, 37 Miss. 617; Vasser v. Henderson, 40 Miss. 519; Scott v. Wallace, 4 J. J. Marsh (Ky.) 654; Roper v. McCook, 7 Ala. 318; Baxter v. Moses, 77 Me. 465; Weigtman v. Hatch, 17 Ill. 286; Bigelow v. Andress, 31 Ill. 334; Beach v. Bestor, 45 Ill. 346.

be shown that the property is not susceptible to levy.[1] And it is immaterial that the return of the execution was made at the request of the plaintiff and within sixty days after its issuance.[2] An embarrassing conflict of decisions, which must be noticed, arose between the Court of Appeals of New York, in Thurber v. Blanck,[3] and the Commission of Appeals of the same State, in Mechanics' Bank v. Dakin.[4] The Commission held that when a suit had been commenced by attachment, and a judgment recovered, the plaintiff, after issuance of execution, and before its return, could maintain an equitable action to set aside a fraudulent assignment of a bond and mortgage, to the end that it might be applied toward the satisfaction of the judgment; the theory being, that by the service of the attachment a lien was acquired upon the bond and mortgage, which could be enforced after judgment, and to which the fraudulent assignment was no impediment.[5] The Court of Appeals held, however, that an equitable action could not be brought in such a case until the remedy at law was first exhausted; that is, until the execution on the judgment had been returned unsatisfied; that no lien could be acquired by the attachment upon a bond and mortgage, the legal title to which was in a third person; that in the case of *choses in action* and debts, the lien is constructive, and cannot operate through an intermediate or inchoate legal title; that in such a case no debt at law is owing to the defendant, and there is nothing for the attachment to operate upon, since it can only act upon legal rights, and not upon mere equitable interests; that *debts* and *choses in action* are legal assets under the attachment law only when the process acts directly upon the legal title, and that when they are so situated as to require the exercise of the equit-

[1] Snodgrass v. Andrews, 30 Miss. 472.
[2] Forbes v. Waller, 25 N. Y. 430.
[3] 50 N. Y. 80.
[4] 51 N. Y. 519; re-argument denied, 54 N. Y. 681. Compare McElwain v. Willis, 9 Wend. (N. Y.) 561; reviewed in Smith v. Weeks, 60 Wis. 100.
[5] See § 81.

able powers of the court to place them in that condition they are to be regarded as equitable assets only, and that, in such a case, to allow the equitable action upon the issuance of an execution, and before its return, would be in direct conflict with the rule that a creditor has no standing in court to reach equitable assets until his remedy at law is exhausted. The decision of the Commission of Appeals, it may be observed, was unanimous, while that of the Court of Appeals was rendered by a majority of the court, three judges dissenting, and three concurring with the chief-justice. The Commission of Appeals was a temporary court called into existence to relieve the overcrowded calendar of the Court of Appeals. Its duration as a court was limited and it has ceased to exist. The Court of Appeals being the permanent appellate court its decision has been generally followed,[1] though it must be conceded that the relief which the Commission of Appeals attempted to extend would, in many instances, prove highly serviceable to creditors. The decision of the New York Court of Appeals, in Thurber v. Blanck,[2] is not to be taken as being in conflict with the class of cases in which it has been held that an equitable action may be brought after the issuance of an execution, and before its return unsatisfied, to set aside a fraudulent transfer of goods and chattels, or of real estate which can be levied upon under the execution when the fraudulent impediment is removed.[3]

§ 87. Distinction between realty and personalty as to issuance of execution.—The predicate of the jurisdiction as affect-

[1] Gross v. Daly, 5 Daly (N. Y.) 543; Castle v. Lewis, 78 N. Y. 137. See Smith v. Longmire, 1 Am. Insolv. R. 426; Anthony v. Wood, 96 N. Y. 185, citing this section.

[2] 50 N. Y. 80.

[3] Gross v. Daly, 5 Daly (N. Y.) 542; McElwain v. Willis, 9 Wend. (N. Y.) 561; Heye v. Bolles, 2 Daly (N. Y.) 231; McCullough v. Colby, 5 Bosw. (N. Y.) 477; North American Fire Ins. Co. v. Graham, 5 Sandf. (N. Y.) 200; Falconer v. Freeman, 4 Sandf. Ch. (N. Y.) 565; Greenleaf v. Mumford, 30 How. Pr. (N. Y.) 30.

ing realty is that the creditor has a lien,[1] and of course if the lien has expired the creditor's action will fail.[2] A judgment is usually a lien upon real property by statute, and hence authority can be found for the proposition that a covinous conveyance of real property can be attacked by a judgment-creditor without the issuance, levy, or return of an execution.[3] Jurisdiction is invoked in such cases in aid of the remedy at law. It may be observed that, as a creditor must usually exhaust the personal property of the judgment-debtor before having recourse to the realty, it is generally essential to show, in proceedings to reach the latter, that an execution has been issued.[4] There is, however, an absence of harmony in the authorities. The question recently came before the New York Court of Appeals,[5] and the result of the decision is briefly to the effect that, in an action to set aside a fraudulent conveyance of realty, the complaint must allege the issuance of an execution and its return unsatisfied, or the action must be brought in aid of an execution then outstanding. The authorities in that State, on the general proposition that all available legal remedies must be pursued before resort to equity,[6] are reviewed, and Shaw v. Dwight[7] distinguished. This

[1] Partee v. Mathews, 53 Miss. 146; Pulliam v. Taylor, 50 Miss. 551–554; Carlisle v. Tindall, 49 Miss. 229–232.

[2] Evans v. Hill, 18 Hun (N. Y.) 464.

[3] Cornell v. Radway, 22 Wis. 260; Mohawk Bank v. Atwater, 2 Paige (N. Y.) 58; Clarkson v. De Peyster, 3 Paige (N. Y.) 320; Shaw v. Dwight, 27 N. Y. 249 (*contra*, Adsit v. Butler, 87 N. Y. 587); Brinkerhoff v. Brown, 4 Johns. Ch. (N. Y.) 671; Royer Wheel Co. v. Fielding, 61 How. Pr. (N. Y.) 437; McCalmont v. Lawrence, 1 Blatch. 232; Newman v. Willetts, 52 Ill. 98; Vasser v. Henderson, 40 Miss. 519; Baldwin v. Ryan, 3 T. & C. (N. Y.) 253; Binnie v. Walker, 25 Ill. App. 82; Multnomah Street Ry. Co. v. Harris, 13 Ore. 198; Payne v. Sheldon, 63 Barb. (N. Y.) 169; Weigtman v. Hatch, 17 Ill. 281; Dargan v. Waring, 11 Ala. 993. See Buswell v. Lincks, 8 Daly (N. Y.) 518.

[4] North Am. Fire Ins. Co. v. Graham, 5 Sandf. (N. Y.) 197; reviewed in McCullough v. Colby, 5 Bosw. (N. Y.) 477.

[5] Adsit v. Butler, 87 N. Y. 586.

[6] Ocean Nat. Bank v. Olcott, 46 N. Y. 12; Geery v. Geery, 63 N. Y. 252; Estes v. Wilcox, 67 N. Y. 264; Allyn v. Thurston, 53 N. Y. 622; McCartney v. Bostwick, 32 N. Y. 62; Fox v. Moyer, 54 N. Y. 125; Crippen v. Hudson, 13 N. Y. 161.

[7] 27 N. Y. 244.

decision being the most recent utterance of the court of last resort, it follows that in New York State at least, execution must issue upon a judgment before a creditor's action, or a suit to annul a fraudulent conveyance of realty can be supported. This places real property and equitable interests on substantially the same basis, as regards the status of an attacking creditor, and in some measure restricts his rights.[1]

To obtain an equitable lien upon property not the subject of levy and sale under execution, the creditor must, of course, have exhausted his remedy under his judgment or decree by the return of an execution unsatisfied.[2] The return of the execution, even as to personalty capable of being subjected to a lien, is not always essential. In Buswell v. Lincks,[3] Chief-Justice Daly said: "The equitable aid of the court to set aside a fraudulent conveyance is given where the one invoking it has a lien upon the property which is obstructed by the conveyance. In the case of personal property, a judgment-creditor acquires, by the

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[1] See Verner v. Downs, 13 S. C. 449; Hyde v. Chapman, 33 Wis. 399; Dana v. Haskell, 41 Me. 25. In the Halladay Case, 27 Fed. Rep. 845, the court say: "The issue of an execution, and the return of *nulla bona* thereon, is considered sufficient evidence of the insolvency of the judgment-debtor, and that the judgment-creditor is remediless at law. But it is not the only evidence of that fact, nor, in my judgment, always the best. The authorities are in apparent conflict on this question. Wait Fraud. Conv. § 68; Bump Fraud. Conv. 518, 527. But where the diversity is not the result of local legislation, I think the apparent conflict arises from confounding creditors' bills to subject personal property to the satisfaction of a judgment with an ordinary bill in equity to set aside or postpone a conveyance of real property on which the plaintiff's judgment is, as against his debtor, a lien without an execution. In the latter case the right to maintain the suit is based on the unsatisfied judgment, the fraudulent conveyance, and the insolvency of the debtor; which latter fact may be proved by any competent evidence, as well as a return of *nulla bona* on an execution." As to proof of insolvency, see Hodges v. Silver Hill Mining Co., 9 Ore. 200; Terry v. Tubman, 92 U. S. 156; Case v. Beauregard, 101 U. S. 688; McCalmont v. Lawrence, 1 Blatchf. 232.

[2] Clarkson v. De Peyster, 3 Paige (N. Y.) 320; Shaw v. Dwight, 27 N. Y. 249; Brinkerhoff v. Brown, 4 Johns. Ch. (N. Y.) 676; Adsit v. Butler, 87 N. Y. 587; Fox v. Moyer, 54 N. Y. 128.

[3] 8 Daly (N. Y.) 518.

issuing of an execution, a lien upon the personal property of the debtor as against a fraudulent conveyance, and the aid of the court is given in that case to remove the obstruction in the way of the execution, which cannot be done if the execution has been returned, for the lien under it is then at an end."[1]

§ 88. **Raising the objection.**—The objection that the creditor's remedy is at law, or that his bill is without equity, or his lien is suspended, may be raised at the hearing,[2] though it is, of course, safer to bring it up by demurrer, if apparent on the face of the pleading, or by answer, if the defect is not so shown. The court may itself raise the objection.[3]

In concluding this chapter we may state that, as a general rule, under both the old Chancery system and the reformed procedure in New York, the bill should generally show affirmatively that an honest attempt has been made to collect the debt by the issuing of an execution against the debtor and its return unsatisfied, and, where there are several defendants jointly liable, that such effort has been made and the remedy exhausted against all the judgment-debtors before jurisdiction will be entertained in chancery.[4] Where the sole purpose of the bill is to subject real property fraudulently aliened to the lien of a judgment the exaction that execution should have been returned is not uniformly enforced.

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[1] Citing Forbes v. Logan, 4 Bosw. (N. Y.) 475; Watrous v. Lathrop, 4 Sandf. (N. Y.) 700.

[2] Meux v. Anthony, 11 Ark. 423; Tappan v. Evans, 11 N. H. 311; Brown v. Bank of Mississippi, 31 Miss. 454.

[3] Oelrichs v. Spain, 15 Wall. 211.

[4] Voorhees v. Howard, 4 Keyes (N. Y.) 383. See Child v. Brace, 4 Paige (N. Y.) 309; Reed v. Wheaton, 7 Paige (N. Y.) 663.

CHAPTER V.

EXISTING CREDITORS.

§ 89. Classes of creditors—existing and subsequent.
90. Contingent creditors.
91. Who are not creditors.
92. Transfer of right to sue.
93. Voluntary alienations as to existing creditors.
94. Such conveyances only presumptively fraudulent.
95. Evidence of solvency.

"The complainant, not showing that he was at the time a creditor, cannot complain. Even a voluntary conveyance is good as against subsequent creditors, unless executed as a cover for future schemes of fraud."—Mr. Justice Field in *Horbach* v. *Hill*, 112 U. S. 149.

§ 89. **Classes of creditors—existing and subsequent.**—As appertaining to the subject-matter of this treatise, creditors may be said to resolve themselves into two great classes or subdivisions, commonly named existing creditors and subsequent creditors. Existing creditors are those whose claims or demands against the debtor were in being in some form at the date of the alleged voluntary or fraudulent alienation.[1] Subsequent creditors are those to whom the insolvent became indebted at a time subsequent to the alienation which is the subject of inquiry. The rights of these two classes of creditors are manifestly and necessarily different;[2] the proofs in each case vary, and the measure of relief extended by the courts in particular instances is largely dependent upon the question as to which of these two classes or subdivisions the complaining creditor belongs. "The difference," says Chancellor Williamson, "between *existing* and subsequent debts, in reference to voluntary conveyances, is this—as to the former the fraud

[1] See Horbach v. Hill, 112 U. S. 149.

[2] See Gordon v. Reynolds, 114 Ill. 123; Jones v. King, 86 Ill. 225.

is an inference of law, but as to the latter there must be fraud in fact."[1] This latter distinction as we shall presently see is not universally applied. Manifestly if the debtor has made any secret reservation for his own benefit the alienation may be overturned by either class of creditors.[2]

§ 90. **Contingent creditors.**—It has been repeatedly adjudged that a party bound by a contract upon which he may become liable for the payment of money, although his liability be contingent, is a debtor within the meaning of the statute avoiding all grants made to hinder or delay creditors.[3] It follows that the person to whom he is bound is a creditor.[4] A wife is a creditor under 13 Eliz. c. 5, in a case where her husband covenanted with trustees to pay her a sum of money after his death.[5] A surety is a creditor from the time the obligation is entered into ;[6] a person liable contingently as an accommodation indorser is a creditor before the dishonor of the note ;[7] and a warrantor, if at the date of the deed a paramount title was outstanding, is, from the time of the conveyance, a debtor to the warrantee.[8] A municipal corporation is, upon the issuance to the proper officer of a tax warrant, a creditor within the statute.[9] The date when the agreement or obligation came into existence governs[10] in determining the complaining or

[1] Cook v. Johnson, 12 N. J. Eq. 54.

[2] See Gordon v. Reynolds, 114 Ill. 123.

[3] Young v. Heermans, 66 N. Y. 384; Fearn v. Ward, 65 Ala. 33; Van Wyck v. Seward, 18 Wend. (N. Y.) 375, 383, and cases cited; Shontz v. Brown, 27 Pa. St. 123; Bibb v. Freeman, 59 Ala. 612; Cook v. Johnson, 12 N. J. Eq. 52; Hamet v. Dundass, 4 Pa. St. 178; Jenkins v. Lockard, 66 Ala. 381.

[4] See Jackson v. Seward, 5 Cow. (N. Y.) 67; Jackson v. Myers, 18 Johns. (N. Y.) 425.

[5] Rider v. Kidder, 10 Ves. 360.

[6] Pennington v. Seal, 49 Miss. 525.

[7] Hamet v. Dundass, 4 Pa. St. 178.

[8] Gannard v. Eslava, 20 Ala. 740; Pennington v. Seal, 49 Miss. 525.

[9] Stimson v. Wrigley, 86 N. Y. 332. A judgment for costs accrues at the time the judgment is rendered, and not when the action is commenced, as regards the question of whether the claimant is an existing or subsequent creditor. Inhabitants of Pelham v. Aldrich, 8 Gray (Mass.) 515; Ogden v. Prentice, 33 Barb. (N. Y.) 160; Stevens v. Works, 81 Ind. 449.

[10] Van Wyck v. Seward, 18 Wend.

attacking creditor's rights. As elsewhere shown, a person whose claim arises from a tort,[1] such as libel or slander,[2] is a creditor. The date the tort or injury was committed governs in determining the creditor's status, where the conveyance was made in pursuance of a fraudulent design to defeat the judgment which might be recovered upon it.[3] So a transfer to defeat a claim for deceit,[4] for usury penalties,[5] breach of promise to marry,[6] seduction,[7] bastardy,[8] and assault and battery,[9] may be annulled. And a wife may attack alienations intended to defeat claims for alimony.[10] In Pendleton v. Hughes,[11] the defendants, at the date of the fraudulent alienation, had in their possession a 5–20 U. S. bond belonging to plaintiff which they afterward converted. The court held that plaintiff was equitably entitled to protection against the fraudulent transfer to the same extent as though the defendants had been indebted to her in that amount at the time of the fraudulent alienation.

§ 91. **Who are not creditors.**—In Baker v. Gilman,[12] the court speaking by Johnson, J., said that the sole object of

(N. Y.) 375; Seward v. Jackson, 8 Cowen (N. Y.) 406. See Wooldridge v. Gage, 68 Ill. 158; Stone v. Myers, 9 Minn. 309.

[1] Post v. Stiger, 29 N. J. Eq. 558; Scott v. Hartman, 26 N. J. Eq. 90; Pendleton v. Hughes, 65 Barb. (N. Y.) 136; Barling v. Bishopp, 29 Beav. 417; Shean v. Shay, 42 Ind. 375; Bongard v. Block, 81 Ill. 186; Weir v. Day, 57 Iowa 87; Jackson v. Myers, 18 Johns. (N. Y.) 425; Shontz v. Brown, 27 Pa. St. 131; Harris v. Harris, 23 Gratt. (Va.) 737; Tobie & Clark Mfg. Co. v. Waldron, 75 Me. 472. See § 123.

[2] Cooke v. Cooke, 43 Md. 522; Hall v. Sands, 52 Me. 355. But see Fowler v. Frisbie, 3 Conn. 320.

[3] Miller v. Dayton, 47 Iowa 312; Evans v. Lewis, 30 Ohio St. 11; Ford v. Johnston, 7 Hun (N. Y.) 563.

[4] Miner v. Warner, 2 Grant (Pa.) 448.

[5] Heath v. Page, 63 Pa. St. 108.

[6] Hoffman v. Junk, 51 Wis. 613; McVeigh v. Ritenour, 40 Ohio St. 107.

[7] Hunsinger v. Hofer, 110 Ind. 390.

[8] Schuster v. Stout, 30 Kans. 530.

[9] Martin v. Walker, 12 Hun (N. Y.) 46.

[10] Morrison v. Morrison, 49 N. H. 69; Bouslough v. Bouslough, 68 Pa. St. 495; Turner v. Turner, 44 Ala. 437; Dugan v. Trisler, 69 Ind. 553; Bailey v. Bailey, 61 Me. 361; Livermore v. Boutelle, 11 Gray (Mass.) 217; Chase v. Chase, 105 Mass. 385; Hinds v. Hinds, 80 Ala. 225, 227, citing this section; Foster v. Foster, 56 Vt. 546; Stuart v. Stuart, 123 Mass. 370; Burrows v. Purple, 107 Mass. 435.

[11] 65 Barb. (N. Y.) 136.

[12] 52 Barb. (N. Y.) 37.

the statute "in declaring conveyances void, is to protect, and prevent the defeat of, *lawful* debts, claims, or demands, and not those which are unlawful, or trumped up, and which have no foundation in law or justice, and the verity of which is never established by any judgment, or by the assent of the person against whom they are made. As against claims and demands of the latter class, the statute does not forbid conveyances or assignments, nor declare them void." So a party who is not a *bona fide* creditor is not entitled to equitable relief on a creditor's bill.[1] A pretended creditor whose claim is illegal,[2] or void as against public policy,[3] or barred by statute at law,[4] or who is not concerned in the transfer,[5] cannot support a creditor's action. A court of equity can only lend its aid to enforce a judgment which could be enforced at law.

§ 92. **Transfer of right to sue.**—It may be here observed that the right to avoid a fraudulent conveyance is not personal to the then existing creditor; his successors and assigns may enforce the right. Thus the subsequent purchaser of a pre-existing note may attack a transfer.[6] Campbell, J., says:[7] "No change in the ownership or the form of the debt affects the right incident to the debt to attack a conveyance fraudulent as to it." Davis, J., observed: "The conveyance was void as against the person intended to be defrauded, and his heirs, successors, executors, administrators, and *assigns*, if *their* actions, suits, debts, etc., were liable to be delayed or hindered thereby."[8]

§ 93. **Voluntary alienations as to existing creditors.**—At first blush it would seem apparent that every voluntary alienation of a debtor's estate, aside from the question of

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[1] Townsend v. Tuttle, 28 N. J. Eq. 449. See § 73.

[2] Fuller v. Bean, 30 N. H. 186. See Walker v. Lovell, 28 N. H. 138.

[3] Bruggerman v. Hoerr, 7 Minn. 337.

[4] Edwards v. M'Gee, 31 Miss. 143.

[5] Morrison v. Atwell, 9 Bosw. (N. Y.) 503; Powers v. Graydon, 10 Bosw. (N. Y.) 630.

[6] Warren v. Williams, 52 Me. 349.

[7] Cook v. Ligon, 54 Miss. 655.

[8] Warren v. Williams, 52 Me. 349.

intent, ought to be avoided as to existing creditors. The debtor's property is the fund upon which the creditor relied in extending the credit, and that, after the claim accrued, this fund should be depleted and pass into the hands of persons who did not pay value for it, is a palpable injustice to the creditor whose claim remains unpaid. Exactly how to accomplish substantial justice in such cases, and yet to give full scope and effect to the proper presumptions and rules of law, is not easily determined. Shall such a conveyance be declared *prima facie* or absolutely void?

Some of the confusion and uncertainty which has been introduced into this subject in this country may be traced to the celebrated decision of Chancellor Kent in the widely known case of Reade v. Livingston,[1] in which it was held that a voluntary marriage settlement after marriage, was of itself void as to existing creditors. This case has been declared by an essayist[2] to be "the grandest monument of legal acumen and wide and varied erudition which New York has ever produced," and while it is conceded that the case was repudiated by the courts of the very State which gave it birth,[3] it was asserted that "unless indications are wholly delusive the learned Chancellor was not more than a century in advance of his age."[4] The English Court of Chancery in Freeman v. Pope,[5] substantially acknowledge

[1] 3 Johns Ch. (N. Y.) 481; s. c. 8 Am. Dec. 520.

[2] Fraudulent Conveyances to *Bona Fide* Purchasers, etc., by John Reynolds, Esq., cited *supra*.

[3] Seward v. Jackson, 8 Cow. (N. Y.) 406. By statute in New York, as elsewhere shown, the question of fraud is made one of fact, and no conveyance is considered fraudulent as against creditors or purchasers solely on the ground that it was not founded upon a valuable consideration. See Dygert v. Remerschnider, 32 N. Y. 636.

[4] See Doe *d.* Davis v. McKinney, 5 Ala. 719; Foote v. Cobb, 18 Ala. 585; Gannard v. Eslava, 20 Ala. 732; Spencer v. Godwin, 30 Ala. 355; Crawford v. Kirksey, 55 Ala. 282; Early v. Owens, 68 Ala. 171; Cook v. Johnson, 12 N. J. Eq. 51; Smith v. Vreeland, 16 N. J. Eq. 198; Kuhl v. Martin, 26 N. J. Eq. 60; Haston v. Castner, 31 N. J. Eq. 697; City National Bank v. Hamilton, 34 N. J. Eq. 158; Aber v. Brant, 36 N J. Eq. 116; Fellows v. Smith, 40 Mic' 689; Matson v. Melchor, 42 Mich.

[5] L. R. 9 Eq. at p. 211.

the doctrine of this case and give the following emphatic and extreme illustration: If at the time of a voluntary settlement, the settler "had £100,000, and put £100 in the settlement, and a creditor for say £10, happened to be unpaid in consequence of the settler losing his money in the interval, that would be quite sufficient to set aside the voluntary settlement"; and the doctrine of the case is unreservedly followed in many American cases.[1] Salmon v. Bennett,[2] a leading early case, created an exception to the rule set forth in Reade v. Livingston, and tends to uphold voluntary conveyances to relatives as distinguished from strangers, where actual fraud is not found.[3]

§ 94. **Such conveyances only presumptively fraudulent.**—If, however, the majority rule is to be applied in determining this conflict, or the cases are to be counted and not weighed, then it must be conceded that a voluntary alienation by a person who happens to be indebted at the time is only *prima facie* fraudulent.[4] In Smith v. Vodges,[5] Swayne, J., said: "In order to defeat a settlement made by a husband upon his wife, it must be intended to defraud existing creditors, or creditors whose rights are expected shortly to supervene,

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[1] See Crawford v. Kirksey, 55 Ala. 282; Spencer v. Godwin, 30 Ala. 355; Hanson v. Buckner, 4 Dana (Ky.) 251; Emerson v. Bemis, 69 Ill. 540; Annin v. Annin, 24 N. J. Eq. 184; Richardson v. Rhodus, 14 Rich. Law (S. C.) 96.

[2] 1 Conn. 525.

[3] See § 242. Foster v. Foster, 56 Vt. 548; Lloyd v. Fulton, 91 U. S. 479; Babcock v. Eckler, 24 N. Y. 623; Gale v. Williamson, 8 M. & W. 405.

[4] See note to Jenkins v. Clement, 14 Am. Dec. 705; Pence v. Croan, 51 Ind. 336; Gwyer v. Figgins, 37 Iowa 517; Wilson v. Kohlheim, 46 Miss. 346; Bank of U. S. v. Housman, 6 Paige (N. Y.) 526; Holden v. Burnham, 63 N. Y. 74; Eigleberger v. Kibler, 1 Hill's Ch. (S. C.) 113; s. c. 26 Am. Dec. 192; Heiatt v. Barnes, 5 Dana (Ky.) 220; Koster v. Hiller, 4 Bradw. (Ill.) 24; Fellows v. Smith, 40 Mich. 691; Grant v. Ward, 64 Me. 239; French v. Holmes, 67 Me. 190; Warner v. Dove, 33 Md. 579; Babcock v. Eckler, 24 N. Y. 623; Greenfield's Estate, 14 Pa. St. 489; Clark v. Depew, 25 Pa. St. 509; Pomeroy v. Bailey, 43 N. H. 118; Dewey v. Long, 25 Vt. 564; Lloyd v. Fulton, 91 U. S. 485; Hoxie v. Price, 31 Wis. 82. The voluntary donee "is entitled only to that which his donor could honestly give." Adams' Equity, p. 149. See Green v. Givan, 33 N. Y. 343.

[5] 92 U. S. 183.

or creditors whose rights may and do so supervene; the settler purposing to throw the hazards of business in which he is about to engage upon others, instead of honestly holding his means subject to the chance of those adverse results to which all business enterprises are liable."[1] "The sentiment of these cases," says Mr. Freeman,[2] "is well expressed in Lerow v. Wilmarth,[3] by Chief-Justice Bigelow: 'We do not wish to be understood as giving our sanction to the doctrine that a voluntary conveyance by a father for the benefit of his child is *per se* fraudulent as to existing creditors, although shown not to have been fraudulent in fact, and is liable to be set aside, because the law conclusively presumes it to have been fraudulent, and shuts out all evidence to repel such presumption. The better doctrine seems to us to be that there is, as applicable to voluntary conveyances made on a meritorious consideration, as of blood and affection, no absolute presumption of fraud which entirely disregards the intent and purpose of the conveyance, if the grantor happened to be indebted at the time it was made, but that such a conveyance under such circumstances affords only *prima facie* or presumptive evidence of fraud which may be rebutted and controlled.'"[4]

§ 95. **Evidence of solvency.**—The Supreme Court of Maine regard it as established law, that mere indebtedness is not sufficient to render a voluntary conveyance void. Consequently it was said that a man, though indebted, may make a valid gift.[5] Mere insolvency will not, of course,

[1] Citing Sexton v. Wheaton, 8 Wheat. 229; Mullen v. Wilson, 44 Pa. St. 413; Stileman v. Ashdown, 2 Atk. 481.

[2] See note to Jenkins v. Clement, 14 Am. Dec. 705.

[3] 9 Allen (Mass.) 386.

[4] See Hinde v. Longworth, 11 Wheat. 199; Verplank v. Sterry, 12 Johns. (N. Y.) 536, 559; Seward v. Jackson, 8 Cow. (N. Y.) 406; Dunlap v. Hawkins, 59 N. Y. 346; Walter v. Lane, 1 MacAr. (D. C.) 284; Parish v. Murphree, 13 How. 92; Moritz v. Hoffman, 35 Ill. 553; Koster v. Hiller, 4 Bradw. (Ill.) 24.

[5] French v. Holmes, 67 Me. 193. See McFadden v. Mitchell, 54 Cal. 628; Patterson v. McKinney, 97 Ill. 47; Hinde v. Longworth, 11 Wheat. 213; Merrell v. Johnson, 96 Ill. 230.

render a deed fraudulent provided it was made with the sole view of paying a debt due to the grantee.[1] As a general rule if the donor is solvent, and has, after making the gift, sufficient assets remaining to satisfy his creditors, the gift will be upheld.[2] Subsequent insolvency will not generally render it invalid.[3] In such cases the creditors' trust fund cannot be said to have been depleted by the alienation. If their claims remain unsatisfied it is due to some subsequently accruing cause. Judge Lowell, in Pratt v. Curtis,[4] derives the following propositions from the cases: "(1). A voluntary conveyance to a wife or child is not fraudulent *per se;* but it is a question of fact in each case whether a fraud was intended. (2). Such a deed, made by one who is considerably indebted, is *prima facie* fraudulent, and the burden is on him to explain it. (3). This he may do by showing that his intentions were innocent, and that he had abundant means, besides the property conveyed, to pay all his debts."[5] The rule may be summed up to the effect that the gift, conveyance, or settlement will be upheld "if it be reasonable, not disproportionate to the husband's means, taking into view his debts and situation, and clear of any intent, actual or constructive, to defraud creditors."[6] Dunlap v. Hawkins[7] embodies an important statement of the law upon this subject. The principle is asserted that a creditor cannot impeach a conveyance founded on natural love and affection, free from the imputation of fraud, when the grantor had, independent of the

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[1] Fuller v. Brewster, 53 Md. 362. See Copis v. Middleton, 2 Madd. 410; Phettiplace v. Sayles, 4 Mason 312; Hardey v. Green, 12 Beav. 182; Atwood v. Impson, 20 N. J. Eq. 150.

[2] Stewart v. Rogers, 25 Iowa 395; Gridley v. Watson, 53 Ill. 193; Winchester v. Charter, 97 Mass. 140.

[3] Dunn v. Dunn, 82 Ind. 43. See Rose v. Colter, 76 Ind. 590; Evans v. Hamilton, 56 Ind. 34; Sherman v. Hogland, 54 Ind. 578; Pence v. Croan, 51 Ind. 336.

[4] 2 Lowell, 90.

[5] See, also, note to Jenkins v. Clement, 14 Am. Dec. 707; Herring v. Richards, 1 McCrary 574.

[6] See Herring v. Richards, 1 McCrary 574.

[7] 59 N. Y. 346.

property granted, an ample fund to satisfy his creditors.[1] Allen, J., in the course of the opinion, said: "By proving the pecuniary circumstances and condition of the grantor, or him who pays for and procures a grant from others, his business and its risks and contingencies, his liabilities and obligations, absolute and contingent, and his resources and means of meeting and solving his obligations, and showing that he was neither insolvent nor contemplating insolvency, and that an inability to meet his obligations was not and could not reasonably be supposed to have been in the mind of the party, is the only way by which the presumption of fraud, arising from the fact that the conveyance is without a valuable consideration, can be repelled and overcome, except as the party making or procuring the grant may, if alive, testify to the absence of all intent to hinder, delay, or defraud creditors." And in Parish v. Murphree[2] the court observed: "To hold that a settlement of a small amount, by an individual in independent circumstances, and which, if known to the public, would not affect his credit, is fraudulent, would be a perversion of the statute." In Carpenter v. Roe,[3] the New York Court of Appeals held that, to invalidate a voluntary conveyance, belief by the debtor as to his insolvency was not absolutely necessary; it was sufficient if his solvency was contingent upon the stability of the market in the business in which he was engaged. In other words, a debtor has not the right to make voluntary alienations so as to leave himself in a condition in which he hazards the rights of creditors on the contingency of a fluctuating market. In Cole v. Tyler[4] the court say: "It was at one time the rule that a voluntary conveyance by one indebted at the time was fraudulent, as *a matter of*

[1] See Jackson v. Post, 15 Wend. (N. Y.) 588; Phillips v. Wooster, 36 N. Y. 412; Bank of U. S. v. Housman, 6 Paige (N. Y.) 526; Fox v. Moyer, 54 N. Y. 125; Van Wyck v. Seward, 6 Paige (N. Y.) 62; Jackson v. Miner, 101 Ill. 554.

[2] 13 How. 98.

[3] 10 N. Y. 227.

[4] 65 N. Y. 78.

law, towards his creditors. No evidence was allowed to rebut the presumption of fraud.[1] This rule was subsequently deemed to be too severe by the courts, and the less stringent rule was adopted that, while a conveyance by a person indebted was presumptively or *prima facie* fraudulent, the presumption might be rebutted by proof to the contrary.[2] This presumption, however, is not to be overthrown by mere evidence of good intent, or generous impulses or feelings. It must be overcome by circumstances showing on their face that there could have been no bad intent, such as that the gift was a reasonable provision, and that the debtor still retained sufficient means to pay his debts. He can no more delay his creditors by such voluntary conveyance than he can actually defraud them."[3]

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[1] Reade v. Livingston, 3 Johns. Ch. (N. Y.) 481. See § 93.

[2] Seward v. Jackson, 8 Cow. 406.

[3] Carpenter v. Roe, 10 N. Y. 230; Babcock v. Eckler, 24 N. Y. 623; Dygert v. Remerschnider, 32 N. Y. 648; Curtis v. Fox, 47 N. Y. 300.

CHAPTER VI.

SUBSEQUENT CREDITORS.

§ 96. } Fraud upon subsequent creditors.
97. }

98. Proof of intent.

99. Conveyance by embarrassed debtor.

100. Placing property beyond the risk of new ventures or speculations.

101. Conveyances avoided.

§ 102. Conveyances not considered fraudulent.

103. Subrogation of subsequent creditors.

104. Subsequent creditors sharing with antecedent creditors.

105. Mixed claims accruing prior and subsequent to alienation.

106. Creditors whose claims accrued after notice of alienation.

§ 96. **Fraud upon subsequent creditors.**—The great practical distinction between existing or antecedent creditors and subsequent creditors in most of the States is, that a voluntary alienation is considered, as to the former, presumptively fraudulent, while as to the latter the burden of proving an intention to commit a fraud, or the existence of a secret trust or reservation, rests upon the creditor. Generally speaking, subsequent creditors must elicit facts showing contemplation of future indebtedness by the insolvent.[1] Voluntary deeds it should be remembered are ordinarily invalid only at the suit of antecedent creditors,[2] and the absence of evidence showing fraud in the transaction will usually defeat the actions of subsequent creditors.[3] As we shall presently see there is no presumption to aid the latter class.[4] A specific intent to defraud subsequent creditors

[1] See Todd v. Nelson, 109 N. Y. 327; Teed v. Valentine, 65 N. Y. 474; Savage v. Murphy, 34 N. Y. 508.

[2] Hinde's Lessee v. Longworth, 11 Wheat. 211; Sexton v. Wheaton, 8 Wheat. 229, 252; S. C. 1 Am. Lea. Cas. 17; Loeschigk v. Addison, 4 Abb. N. S. (N. Y.) 210, affi'd 51 N. Y. 660. See § 89, and Chap. V.

[3] Ford v. Johnston, 7 Hun (N. Y.) 568; Dygert v. Remerschnider, 32 N. Y. 649; Cole v. Varner, 31 Ala. 244.

[4] Herring v. Richards, 1 McCrary 574.

will manifestly avoid the transfer as to them[1] In the absence of proof of such an intent the transaction will stand.[2] Chancellor Kent in his celebrated judgment pronounced in Reade v. Livingston,[3] a case already noticed, said: "The cases seem to agree, that the subsequent creditors are let in only in particular cases; as where the settlement was made in contemplation of future debts, or where it is requisite to interfere and set aside the settlement, in favor of the prior creditor."[4] Judge Story observed: "Where the settlement is set aside as an intentional fraud upon creditors there is strong reason for holding it so as to subsequent creditors, and to let them into the full benefit of the property."[5] In Savage v. Murphy,[6] it appeared that the judgment-debtor was engaged in an extensive business on credit, in which he was considerably indebted, and that he stripped himself of the title to all his property by transfer to his wife and children for a merely nominal pecuniary consideration, without any visible change of possession, and with the intent to contract and continue a future indebtedness in his business on the credit of his apparent ownership of the property transferred, and to avoid payment of his debts. After the transfer he continued in business, making new purchases on credit, and using part of the avails of each successive purchase to pay the indebtedness then existing, during a period of about ten months, at the end of which time he failed, owing debts thus contracted amounting to $3,500. The court, upon these facts, held that it was clear that the transfer thus made was fraudulent and void as

[1] McPherson v. Kingsbaker, 22 Kan. 646; United States v. Stiner, 8 Blatchf. 544; Candee v. Lord, 2 N. Y. 275; Anon. 1 Wall. Jr. 113; Horn v. Ross, 20 Ga. 223; Black v. Nease, 37 Pa. St. 433; Johnston v. Zane, 11 Gratt. (Va.) 552.

[2] Teed v. Valentine, 65 N. Y. 474, and cases cited.

[3] 3 Johns. Ch. (N. Y.) 497. See Chap. V.

[4] See Walter v. Lane, 1 MacAr. (D. C.) 275.

[5] See also Ede v. Knowles, 2 Y. & C. N. R. 172–178, cited in Story's Eq. Jur. § 361, n.; Dewey v. Moyer, 72 N. Y. 76.

[6] 34 N. Y. 508. See Todd v. Nelson, 109 N. Y. 327.

against subsequent creditors. The design to obtain a credit after the conveyance by means of the continued possession and apparent ownership of the property, which the debtor thus placed beyond the reach of those who might give him future credit, was plainly fraudulent. The conclusion of fraud was not repelled by the circumstance that the debts owing by him at the time of the transfer were paid with the proceeds of credit subsequently acquired by the means already stated. The indebtedness then existing was merely transferred, not paid, and the fraud was as palpable as it would have been if the debts remaining unpaid were owing to the same creditors to whom he was obligated at the time of the transfers.[1]

§ 97. — It may be here observed that a fraudulent and deceitful conveyance of property, made without valuable consideration, and with intent to injure the rights or avoid the debts of any other person, is invalid as to subsequent creditors as well as to those who were creditors at the time of the conveyance.[2] In Parkman v. Welch,[3] Dewey, J., in speaking of the rights of subsequent creditors, said: "This raises the question whether the effect of the statute of 13 Eliz. c. 5, is to avoid conveyances made upon secret trust and with fraudulent intent, as well in favor of subsequent as previous creditors. On this subject we apprehend the law is well settled, ... that a conveyance fraudulent at

[1] See S. P. Carr v. Breese, 18 Hun (N. Y.) 134; S. C. 1 Am. Insolv. Rep. 255. In Todd v. Nelson, 109 N. Y. 327, Peckham, J., said: "The theory upon which deeds conveying the property of an individual to some third party have been set aside as fraudulent in regard to subsequent creditors of the grantor has been that he has made a secret conveyance of his property while remaining in the possession and seeming ownership thereof, and has obtained credit thereby, while embarking in some hazardous business requiring such credit, or the debts which he has incurred were incurred soon after the conveyance, thus making the fraudulent intent a natural and almost a necessary inference, and in this way he has been enabled to obtain the property of others who were relying upon an appearance which was wholly delusive."

[2] McLane v. Johnson, 43 Vt. 48. See Clark v. French, 23 Me. 221.

[3] 19 Pick. (Mass.) 237.

the time of making it, might be avoided in favor of subsequent creditors."[1] In Toney v. McGehee,[2] the rule is recognized that a voluntary conveyance may be impeached by a subsequent creditor on the ground that it was made in

[1] See Carpenter v. McClure, 39 Vt. 9. In Day v. Cooley, 118 Mass. 527, the court observed: "It is well settled that if a debtor makes a conveyance with the purpose of defrauding either existing or future creditors, it may be impeached by either class of creditors, or by an assignee in insolvency or bankruptcy who represents both. Parkman v. Welch, 19 Pick. (Mass.) 231; Thacher v. Phinney, 7 Allen (Mass.) 146; Winchester v. Charter, 12 Allen (Mass.) 606; Wadsworth v. Williams, 100 Mass. 126. As it was proved in this case that the grantor had an actual fraudulent design which was participated in by the grantee, it is immaterial whether the demandants are to be regarded as subsequent or existing creditors as to the conveyance."

[2] 38 Ark. 427; 1 Story's Eq. Jurisp. § 361; Claflin v. Mess, 30 N. J. Eq. 211; Pope v. Wilson, 7 Ala. 690; Smith v. Greer, 3 Humph. (Tenn.) 118; Reade v. Livingston, 3 Johns. Ch. (N. Y.) 481.

Rights of subsequent creditors—Laughton v. *Harden.*—The rights of subsequent creditors are considered and the general policy of the courts in dealing with fraudulent transfers learnedly discussed in Laughton v. Harden, 68 Me. 208. The doctrine is there asserted that a voluntary conveyance from father to son, made with the intent to defraud creditors, may be avoided as to such creditors without allegations or proof that the grantee participated in the fraudulent intent. The court said: "The exact question presented is this: Is a voluntary conveyance from father to son, made by the grantor with an intent to defraud subsequent creditors, void as to such creditors, when there is no proof that the grantee participated in that intent when he received or accepted the deed? The statute of Elizabeth, c. 5, answers the question in the affirmative. It pronounces every conveyance, made to hinder, delay, or defraud creditors, utterly void as against such creditors, unless the estate shall be, 'upon good consideration, and *bona fide*, lawfully conveyed to such person,' not having at the time 'any manner of notice' of such fraud. Can it be said that this estate was *bona fide*, 'lawfully' conveyed, or that a grantee who pays no consideration for land fraudulently conveyed to him has 'no manner of notice' of the fraud? But this is not all of the statute. It threatens a penalty against a party to such a conveyance who, being privy and knowing thereto, 'shall wittingly and willingly put in use, avow, maintain, justify, and defend the same,' as true and *bona fide* and upon good consideration. When a grantee in such a deed becomes informed of the grantor's intent, does he not assist in executing that intent by an endeavor to uphold and maintain the deed? Is he not, in the eye of the law, presumed to be a participator in the fraud? Should not an honest grantee repudiate the deed? The grantee, by the fraudulent act of his grantor, becomes the trustee or depositary of property which belongs to the grantor's creditors. By attempting to withhold it from the creditors, does not the grantee himself commit a fraud? If innocent in the beginning, does he not become guilty in the end? The governing and acting intent was

fraud of existing creditors; but, to be successful, the subsequent creditor must show either that actual fraud was intended, or that there were debts still outstanding, which the grantor owed at the time it was made.

§ 98. **Proof of intent.**—The subject of the intent of the parties to an alleged fraudulent transfer will be considered presently.[1] Speaking of the sufficiency of the evidence of the intent to defraud subsequent creditors, Johnson, J., said:[2] "Upon the question of fraudulent intent, or whether the conveyance is fraudulent in fact, as to subsequent creditors, it is proper to consider the circumstances of its being voluntary, and the party indebted at the time; and if additional circumstances connected with those two be sufficient to show fraud in fact, it is void as to subsequent creditors. It is not necessary that there should be direct proof to show the fraud; it is to be legally inferred from the facts and circumstances of the case, where those facts and circumstances are of such a character as to lead a reasonable man to the conclusion that the conveyance was made with intent to hinder, delay, or defraud existing or future creditors."[3] Folger, J., delivering the opinion of the New

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the grantor's. Does not the grantee endeavor to avail himself of it and adopt it when he holds on to the deed? No other conclusion can be reached. Of course it will not at this day be questioned that any conveyance may be avoided by subsequent as well as by prior creditors, if fraud was by such conveyance meditated against subsequent creditors. Wyman v. Brown, 50 Me. 139; Bailey v. Bailey, 61 Me. 361. Any other view of this question than the one taken by us would permit and encourage most iniquitous frauds upon the part of badly disposed debtors. A man might convey all his property to his wife or minor children upon the eve of an expected bankruptcy, and, on account of his undoubted credit and apparent possession of means and property, be enabled to create a very great amount of subsequent indebtedness. How could a creditor show that the wife, and *a fortiori*, that the young minor children knew of the grantor's fraud, unless the knowledge can be imputed to them under such circumstances as a necessary implication of law? It would be unnatural for a debtor's wife and children to believe him to be a dishonest man, and uncommon for them to know much of his business affairs."

[1] See Chap. XIV.

[2] Rose v. Brown, 11 W. Va. 134.

[3] See Carpenter v. Roe, 10 N. Y. 227; Larkin v. McMullin, 49 Pa. St. 29.

York Court of Appeals in Shand v. Hanley,[1] observes upon this subject that "there is no difference in result, as there is no difference in the intention to produce the result, between a transfer of property to defraud a creditor existing at the time, and a creditor thereafter to be made."[2] A conveyance intended to defraud creditors is voidable not only as to existing but as to future creditors.[3] The intent must be mutual. Marriage, as we shall elsewhere see, is a valuable consideration which is much respected in the law, and an antenuptial settlement, though made by the settler with the design of defrauding his creditors, will not be annulled in the absence of the clearest proof of participation in the fraud on the part of the wife.[4]

§ 99. **Conveyance by embarrassed debtor.**—In Wallace v. Penfield,[5] it appeared that the debtor, who was somewhat indebted at the time, made a voluntary settlement upon his wife, by causing the title to the lands in question to be taken in her name, with the intention of immediately building upon and improving the land and using it as a permanent residence for himself and family. It was shown by a preponderance of evidence that when the settlement was effected, and during the period the land was being built upon and improved, the debtor had property which creditors could have reached, exceeding in value his indebtedness by several thousand dollars, and was engaged in an active business with fair prospects. All the creditors whose claims existed at the date of the settlement, or during the period when the debtor was making expenditures for improvements, had been fully paid and discharged. The plaintiff's

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[1] 71 N. Y. 319, 322; Matter of Brown, 39 Hun (N. Y.) 27; Case v. Phelps, 39 N. Y. 164.

[2] See Mullen v. Wilson, 44 Pa. St. 416.

[3] Partridge v. Stokes, 66 Barb. (N. Y.) 586. See Case v. Phelps, 39 N. Y. 164; Carr v. Breese, 81 N. Y. 584; Thomson v. Dougherty, 12 S. & R. (Pa.) 448; Lockhard v. Beckley, 10 W. Va. 87.

[4] Prewit v. Wilson, 103 U. S. 22. See Chap. XX.

[5] 106 U. S. 260; S. C. 1 Sup. Ct. Reporter, 216.

claim accrued subsequently. The Supreme Court of the United States very properly decided that these facts were entirely consistent with an honest purpose to deal fairly with any creditors the debtor then had, or might thereafter have in the ordinary course of his business, and that neither the conveyance to the wife, nor the withdrawal of the husband's means from his business for the purpose of improving the land settled upon the wife, had the effect to hinder or defraud his then existing or subsequent creditors. In Pepper v. Carter,[1] the Supreme Court of Missouri said: "Some would make an indebtedness *per se* evidence of fraud against existing creditors; others would leave every conveyance of the kind to be judged by its own circumstances, and from them infer the existence or non-existence of fraud in each particular transaction. Without determining the question as to existing creditors, we may safely affirm that all the cases will warrant the opinion that a voluntary conveyance as to subsequent creditors, although the party be embarrassed at the time of its execution, is not fraudulent *per se* as to them; but the fact, whether it is fraudulent or not, is to be determined from all the circumstances. I do not say that the fact of indebtedness is not to weigh in the consideration of the question of fraud in such cases, but that it is not conclusive." The language of this case is quoted approvingly by the same court in the later case of Payne v. Stanton,[2] where it is said: "The doctrine is well settled that a voluntary conveyance by a person in debt, is not, as to subsequent creditors, fraudulent *per se*. To make it fraudulent as to subsequent creditors, there must be proof of actual or intentional fraud. As to creditors existing at the time, if the effect and operation of the conveyance are to hinder or defraud them, it may, as to them, be justly regarded as invalid, but no such reason can be urged in behalf of those who become creditors afterwards." These cases

[1] 11 Mo. 543. [2] 59 Mo. 159.

in Missouri are quoted from at length, and declared to be controlling, by the United States Supreme Court in Wallace v. Penfield, *ubi supra*. In the latter case, however, the facts proved and found by the court expressly repel the idea that the debtor was embarrassed or insolvent when the settlement was made; and the decision can scarcely be regarded as fully approving Payne v. Stanton and similar cases to the effect that an embarrassed debtor may make a voluntary conveyance which will be upheld against subsequent creditors. These Missouri cases are at least dangerously near the border line. The court, in Payne v. Stanton, draws the distinction between existing and subsequent creditors, and says that the conveyance might hinder, delay, and defraud the former, "but no such reason can be urged in behalf of those who become creditors afterwards." This, we respectfully urge, is attaching undue importance to the exact date or period of time when the creditor's claim accrued. The embarrassed debtor, under this rule, might voluntarily alienate the mass of his property, then secure loans or incur obligations to creditors, whose claims would thus be subsequent to the voluntary conveyance, and with the money thus acquired liquidate the obligations existing when the conveyance was effected. The embarrassment of the debtor when the transfer was made calls into being the claims of, and obligations to, the new creditors; the deficit then existed, and the liability has been merely transferred to new parties, while the debtor's embarrassed estate has been further crippled or rendered hopelessly insolvent by the voluntary alienation. It seems to follow that the safer and more prudent rule would be to hold that no voluntary conveyance by an *embarrassed* debtor should be upheld against creditors, whether their claims accrued prior or subsequent to the transfer.

§ 100. **Placing property beyond the risk of new ventures or speculations.**—This brings us to the most important branch

of the subject, viz., the effect of conveyances, gifts, and settlements made to avoid the risks of losses likely to result from new business schemes. To illustrate, a baker who had been carrying on business for some years being about to purchase a grocery business, which he intended to carry on together with his own trade, made a voluntary settlement of nearly the whole of his property upon his wife and children. He then purchased the grocery business, and having lost money sold it, but continued in business as a baker. Three years after the settlement he filed a liquidation petition. The court held that independently of the question whether he was solvent at the date of the settlement, it was voidable as against the trustee in liquidation, under the stat. 13 Eliz. c. 5, on the ground that it was evidently executed with the view of putting the settler's property out of the reach of his creditors in case he should fail in the speculation on which he was about to enter, in carrying on a new business of which he knew nothing.[1] If a settlement is made "on the eve of a new business, and with a view of providing against its contingencies, it is as unavailing against new creditors as against old ones."[2] This same general principle was involved in Case v. Phelps,[3] in the New York Court of Appeals. Woodruff, J., a judge of much learning and great vigor of mind, said: "May a person about to engage in business which he believes may in-

[1] *Ex parte* Russell. *In re* Butterworth, 19 Ch. D. 588; s. c. 51 L. J. Ch. 521; 46 L. T. N. S. 113; 30 W. R. 584; following Mackay v. Douglas, 14 L. R. Eq. 106. Compare Winchester v. Charter, 102 Mass. 272; Beeckman v. Montgomery, 14 N. J. Eq. 106; Cramer v. Reford, 17 N. J. Eq. 383; National Bank of Metropolis v. Sprague, 20 N. J. Eq. 25; Annin v. Annin, 24 N. J. Eq. 194; Case v. Phelps, 39 N. Y. 164.

[2] Black v. Nease, 37 Pa. St. 438. The law should not be so framed or construed as to tempt men to desert their legitimate business, and engage in specious and hazardous speculations, concerning the dangers of which they are ignorant, by allowing them to "make a feather bed on which they may fall lightly," under the plea of affection for their wives and children. Thomson v. Dougherty, 12 S. & R. (Pa.) 451.

[3] 39 N. Y. 169.

volve losses, with a view to entering upon such business, convey his property to his wife, voluntarily, without consideration, to secure it for the benefit of himself and family, in the event that such losses should occur? I cannot regard this question, as in substance, other than the inquiry, May a man, for the purpose of preventing his future creditors from collecting their demands out of his property then owned, and *for the purpose* of casting upon them the hazards of his success in the business in which he is about to engage, convey his property without consideration to his wife, in order to secure the benefit of it to himself and family, however disastrous such business may prove, and continue in the possession, not even putting the deeds upon record, until after such subsequent indebtedness arises?"[1] The question of the validity of a gift or settlement, as to subsequent creditors, as we have said, turns upon the question as to whether it was made in contemplation of future debts,[2] or to secure the debtor "a retreat in the event of a probable pecuniary disaster in a hazardous business in which he proposed to embark."[3] To bring the transfer within this rule, "it must be executed with the intention and design to defraud those who should thereafter become his creditors,"[4] the debtor proposing to throw the hazards of the business in which he is about to engage upon others, instead of honestly holding his means subject to the chance of the adverse results incident to all business enterprises.[5]

But these cases must be considered within proper restrictions. Thus, where a man who was solvent paid for prop-

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[1] See City Nat. Bank v. Hamilton, 34 N. J. Eq. 160.

[2] Walter v. Lane, 1 MacAr. (D. C.) 282.

[3] Fisher v. Lewis, 69 Mo. 631.

[4] Matthai v. Heather, 57 Md. 484. See Williams v. Banks, 11 Md. 198; Moore v. Blondheim, 19 Md. 172.

[5] Smith v. Vodges, 92 U. S. 183; Sexton v. Wheaton, 8 Wheat. 229; Mullen v. Wilson, 44 Pa. St. 418; Stileman v. Ashdown, 2 Atk. 481. Compare United States v. Griswold, 7 Sawyer 335; McPherson v. Kingsbaker, 22 Kan. 646; Sheppard v. Thomas, 24 Kan. 780; Kirksey v. Snedecor, 60 Ala. 192; Marshall v. Croom, 60 Ala. 121.

erty which he procured to be conveyed to his wife, and there was no evidence tending to show that by so doing he intended to defraud any subsequent creditors, it has been held that the conveyance is perfectly valid in her favor as against his subsequent creditors, and that a husband had a right to make a settlement of property upon his wife, provided it was free from fraud.[1] Subsequent indebtedness cannot be invoked to make that fraudulent which was honest and free from impeachment at the time.[2] In Graham v. Railroad Co.,[3] a leading and important case, it is said to be a well-settled rule of law that if an individual, being solvent at the time, without any actual intent to defraud creditors, disposes of property for an inadequate consideration, or even makes a voluntary conveyance of it, subsequent creditors cannot question the transaction. The argument advanced is that such creditors are not injured; they gave credit to the debtor in the status which he had after the voluntary conveyance was made. This rule was applied to an alienation by a corporation.[4]

§ 101. **Conveyances avoided.**—The Chancellor said, in Beeckman v. Montgomery:[5] "Aside from the fact that the deed was made by the father in contemplation of future indebtedness, there are strong circumstances indicating the existence of actual fraud. The deed was made on the eve of the grantor engaging in mercantile business, which would

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[1] Curtis v. Fox, 47 N. Y. 301; Phillips v. Wooster, 36 N. Y. 412.

[2] See Babcock v. Eckler, 24 N. Y. 630; Reade v. Livingston, 3 Johns. Ch. (N. Y.) 500; Seward v. Jackson, 8 Cow. (N. Y.) 406; Hinde's Lessee v. Longworth, 11 Wheat. 199.

[3] 102 U. S. 148. See Wallace v. Penfield, 106 U. S. 260; Mattingly v. Nye, 8 Wall. 370; Sexton v. Wheaton, 8 Wheat. 239, per Marshall, C. J.; s. c. 1 Am. Lea. Cas. 17, where the law upon this subject is learnedly discussed in a note. In Porter v. Pittsburg Bessemer Steel Co., 120 U. S. 673, the court said: "It is a well-settled principle, that subsequent creditors cannot be heard to impeach an executed contract, where their dealings with the company, of which they claim the benefit, occurred after the contract became an executed contract."

[4] Compare Wabash, St. L. & P. Ry. Co. v. Ham, 114 U. S. 587, 594.

[5] 14 N. J. Eq. 112.

require for its successful pursuit both capital and credit. He disposed, at the time of the conveyance, of the entire control of his real estate, which constituted the bulk of his property, leaving himself an inadequate capital for conducting his business or raising loans. The credit which he obtained was due to his former standing as a man of responsibility. The conveyances to his children were not advancements adapted to the means and situation in life of the grantor—they absorbed his whole property. The deed to the defendant was made while he was an infant but sixteen years of age, not needing an advancement, and not of discretion to take charge and management of the property. It was kept secret for more than a year, and was not left at the office to be recorded till the day after a suit at law was commenced by the complainants for the recovery of their debt."[1] If a person about to contract debts makes a voluntary conveyance, with the intent to deprive future creditors of the means of enforcing collection of their debts, and this purpose is accomplished, it is very clear that such creditors are injured and defrauded.[2] A creditor has a right when extending credit, to rely upon the honesty and good faith of the debtor, and may assume, without inquiry, that the debtor has made no fraudulent conveyances of property.[3]

§ 102. **Conveyances not considered fraudulent.**—But the courts will not willingly overturn a settlement or voluntary alienation at the suit of a subsequent creditor, upon slight, unsubstantial, or intangible proof. Carr v. Breese[4] is an

[1] See City Nat. Bank v. Hamilton, 34 N. J. Eq. 158; Carpenter v. Carpenter, 25 N. J. Eq. 194; Dick v. Hamilton, Deady 322; Burdick v. Gill, 7 Fed. Rep. 668; Carter v. Grimshaw, 49 N. H. 100; Snyder v. Christ, 39 Pa. St. 499; Mullen v. Wilson, 44 Pa. St. 413; Barling v. Bishopp, 29 Beav. 417; Clark v. Killian, 103 U. S. 766, affi'g Killian v. Clark, 3 MacAr. (D. C.) 379; Hitchcock v. Kiely, 41 Conn. 611; Williams v. Davis, 69 Pa. St. 21; Pawley v. Vogel, 42 Mo. 303; Herschfeldt v. George, 6 Mich. 456; Hilliard v. Cagle, 46 Miss. 309; Huggins v. Perrine, 30 Ala. 396.

[2] Burdick v. Gill, 7 Fed. Rep. 670.

[3] Ibid.

[4] 81 N. Y. 584; overruling 18 Hun (N. Y.) 134. See S. P. Phœnix Bank v. Stafford, 89 N. Y. 405.

illustration. In that case the New York Court of Appeals, overruling the court below, decided that where a husband, worth $22,000, owing debts amounting to $2,800, which were subsequently paid, and engaged in a prosperous business, purchased property costing about $16,000, and took it in the name of his wife, and paid about $10,000 of the consideration by mortgage on his real estate, and the balance by mortgage upon the premises purchased, the settlement was not unsuitable or disproportionate to his means. Miller, J., speaking for the court, said: "There was no insolvency in fact or in contemplation, no new enterprise started which involved unusual or extraordinary hazard, but the continuance of the business of the grantor for the period of three years, and no dishonest failure, or attempt in any form to defraud. An existing indebtedness alone does not render a voluntary conveyance absolutely fraudulent and void as against creditors, unless there is an intent to defraud.[1] This is especially the case when it is shown that the residue of the property was amply sufficient to pay all debts."[2] It may be observed that although in Babcock v. Eckler,[3] the disproportion was far greater than in Carr v. Breese,[4] the conveyance was upheld; but in this case evidence was introduced tending to show that the conveyance was not entirely voluntary.[5] Again in Carpenter v. Roe,[6] the court, citing Hinde's Lessee v. Longworth,[7] say: "If it can be shown that the grantor was in prosperous circumstances and unembarrassed, and that the gift was a reasonable provision, according to his state and condition in life, and leaving enough for the payment of the debts of

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[1] Citing Van Wyck v. Seward, 6 Paige (N. Y.) 62.

[2] Citing Jackson v. Post, 15 Wend. (N. Y.) 588; Phillips v. Wooster, 36 N. Y. 412; Dunlap v. Hawkins, 59 N. Y. 342.

[3] 24 N. Y. 623.

[4] 81 N. Y. 584.

[5] See Childs v. Connor, 38 N. Y. Superior Ct. 471.

[6] 10 N. Y. 227.

[7] 11 Wheat. 213.

the grantor," the presumptive evidence of fraud would be met and repelled.[1]

§ 103. **Subrogation of subsequent creditors.**—A device to which fraudulent insolvents often resort consists in making a voluntary conveyance and following this up by paying all the antecedent or existing creditors, practically with the moneys derived from the credit extended by subsequent creditors. Savage v. Murphy,[2] already quoted, was such a case.[3] It is a most unsubstantial mode of paying a debt to contract another of equal amount. It is the merest fallacy to call such an act getting out of debt,[4] and the case should be treated as if the prior indebtedness had continued throughout.[5]

§ 104. **Subsequent creditors sharing with antecedent creditors.**—In a case which arose in Massachusetts, in which an administrator sought to annul a fraudulent alienation made by his intestate, Dewey, J., said: "Though the ground of avoiding this conveyance is that the land was liable to be taken to satisfy existing creditors only, yet when the conveyance is avoided, the proceeds of the sale will be assets generally, and other creditors will receive the benefit thereof incidentally."[6] In Kehr v. Smith,[7] Davis, J., observed: "It is well settled, where a deed is set aside as void as to existing creditors, that all the creditors, prior and subsequent, share in the fund *pro rata*."[8] Mr. Peachey ob-

[1] See Crawford v. Logan, 97 Ill. 396; Clark v. Killian, 103 U. S. 766; Wallace v. Penfield, 106 U. S. 260; Pepper v. Carter, 11 Mo. 540; Payne v. Stanton, 59 Mo. 158; Genesee River Nat. Bank v. Mead, 92 N. Y. 637.

[2] 34 N. Y. 508.

[3] See § 96. See also Churchill v. Wells, 7 Coldw. (Tenn.) 364; Moritz v. Hoffman, 35 Ill. 553.

[4] Paulk v. Cooke, 39 Conn. 566.

[5] Edwards v. Entwisle, 2 Mackey (D. C.) 43.

[6] Norton v. Norton, 5 Cush. (Mass.) 530.

[7] 20 Wall. 36.

[8] Citing Magawley's Trust, 5 De G. and Sm. 1; Richardson v. Smallwood, Jacob 552–558; Savage v. Murphy, 34 N. Y. 508; Iley v. Niswanger, Harp. Eq. (S. C.) 295; Robinson v. Stewart, 10 N. Y. 189; Thomson v. Dougherty, 12 S. & R. (Pa.) 448; Henderson v. Hoke, 3 Dev. (N. C.) Law 12–14; Kissam v. Edmundson, 1 Ired. Eq. (N. C.) 180; Sexton v. Wheaton, 1 Am. Lea.

serves:[1] "It has, however, never been disputed but that a subsequent creditor would participate in the benefit of a decree instituted by a prior creditor, and would have the same equity for having the property applied. Again no distinction has been drawn in such cases between the different classes of creditors, that is, between those whose debts existed at the time the deed was executed, and those who became creditors subsequently, or that any priority can be given to those who were creditors at the date of the instrument over the subsequent creditors; all would, in fact, participate *pro rata*."[2] There has been, however, some hesitancy on the part of the courts in holding that a deed which existing creditors could avoid, was, after avoidance by them, to be considered void as to all creditors; for that is practically the effect of letting in subsequent creditors, especially to share *pro rata*. Though the deed cannot be set aside at the instance of subsequent creditors, yet the authorities seem to give them the same benefit when the antecedent creditors succeed in annulling it. It would seem to result that while there is a discrimination in the right to attack the conveyance, there is none as to sharing in the successful result. In considering this feature, however, the rule that a creditor, by filing a bill, acquires an equitable lien and preference in certain cases, must not be overlooked.[3]

§ 105. **Mixed claims accruing prior and subsequent to alienation.**—The right of a grantee or vendee, from whom a

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Cas. 45; Norton v. Norton, 5 Cush. (Mass.) 529; O'Daniel v. Crawford, 4 Dev. (N. C.) Law 197–204; Reade v. Livingston, 3 Johns. Ch. (N. Y.) 481–499; Townshend v. Windham, 2 Ves. Sen. 10; Jenkyn v. Vaughan, 3 Drewry 419-424. See Bassett v. McKenna, 52 Conn. 442, citing this section; Day v. Cooley, 118 Mass. 524.

[1] Peachey on Marriage Settlements, p. 197.

[2] Cited with approval in Ammon's Appeal, 63 Pa. St. 289. See Churchill v. Wells, 7 Coldw. (Tenn.) 364; Trimble v. Turner, 21 Miss. 348; Kipp v. Hanna, 2 Bland's Ch. (Md.) 26; Beach v. White, Walker's Ch. (Mich.) 495; Thomson v. Dougherty, 12 S. & R. (Pa.) 448; Kidney v. Coussmaker, 12 Ves. Jr. 136, note. Compare Converse v. Hartley, 31 Conn. 379.

[3] See Pullis v. Robinson, 5 Mo. App. 548. See § 61; also Chap. XXV.

creditor seeks to wrest property held in trust for a debtor, to require the creditor to show, in a proper case, that his debt accrued before the conveyance which is questioned, is clearly established. As a voluntary or fraudulent conveyance is ordinarily good between the parties, and can be upheld except as against certain classes of persons, it follows that the vendee can force the plaintiff to show that he comes within some privileged class entitled to impeach the transaction.

Where it is important or vital to the creditor's success to show that he was an existing creditor as to the conveyance, and it appears that some of the items of his claims accrued prior and others subsequent to the conveyance, and all these items are embodied in one judgment, it has been held in several cases that he is to be treated as a subsequent creditor, not entitled to attack the conveyance.[1] In Baker v. Gilman[2] the creditor was an attorney, and his claim was for services. Johnson, J., said: "The plaintiff was clearly a subsequent creditor of Gilman. His employment, by virtue of his retainer, was a continuous one until the determination of the actions. It was a single demand for services, a small portion of which were rendered before the conveyance, and the far larger portion long afterwards. This being embraced in one judgment, nearly two years after the conveyance, renders the plaintiff clearly a subsequent creditor." In Reed v. Woodman,[3] it appeared from the evidence that the greater part of the debt which was the foundation of the judgment rendered in favor of the demandant accrued subsequent to the date of the challenged conveyance. The court said: "The levy was entire, and cannot be so apportioned or divided as to constitute a satis-

[1] See Miller v. Miller, 23 Me. 22; S. C. 39 Am. Dec. 598, and notes; Reed v. Woodman, 4 Me. 400; Usher v. Hazeltine, 5 Me. 471; Quimby v. Dill, 40 Me. 528; Moritz v. Hoffman, 35 Ill. 558. *Contra*, Ecker v. Lafferty, 20 Pittsb. L. J. (Pa.) 135.

[2] 52 Barb. (N. Y.) 38.

[3] 4 Me. 400.

faction for that part of his debt which was due prior to that deed. The demandant, having taken judgment for his whole demand, is to be regarded as a creditor subsequent to the conveyance of the land in question by his debtor. He cannot therefore impeach that conveyance but by showing actual fraud."[1]

§ 106. **Status of creditors whose claims accrued after notice of alienation.**—As a general rule a subsequent creditor who acquired his claim with knowledge or notice of the conveyance sought to be annulled, cannot attack it as fraudulent.[2] In Baker v. Gilman, Johnson, J., said: "I do not think a creditor, who has trusted his debtor after being fully informed by the latter that he has put his property out of his hands, by a conveyance, valid as between him and his grantee, though voidable as to existing creditors, should ever be allowed to come into court and claim that such conveyance was fraudulent and void, as to him, on account of such indebtedness. As to such creditor, a conveyance of that kind would not be fraudulent, in any sense, and could not, on that ground, be avoided."[3]

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[1] See Humes v. Scruggs, 94 U. S. 22.

[2] Lehmberg v. Biberstein, 51 Tex. 457; Monroe v. Smith, 79 Pa. St. 459; Herring v. Richards, 3 Fed. Rep. 443. See Knight v. Forward, 63 Barb. (N. Y.) 311; Lewis v. Castleman, 27 Tex. 407.

[3] 52 Barb. (N. Y.) 39. See Sledge v. Obenchain, 58 Miss. 670; Kane v. Roberts, 40 Md. 594; Williams v. Banks, 11 Md. 198; Sheppard v. Thomas, 24 Kans. 780. Compare Kirksey v. Snedecor, 60 Ala. 192.

CHAPTER VII.

WHO MAY BE COMPLAINANTS.

§ 107. Parties complainant.
108. Joinder of complainants.
109. Suing on behalf of others.
110. "And others."
111. Surety.
112. } Executors and administrators.
113. }
114. Assignee in bankruptcy.
115. General assignee.
116. Receivers.
117. Receivers of corporations.
§ 118. Foreign receivers.
119. Creditors of corporations.
120. Sheriff.
121. Heirs—Widow.
122. Husband and wife.
123. Tort creditor.
124. Overseer of the poor.
125. Creditors having liens.
126. Purchaser removing incumbrances.
127. Creditors opposing will.

§ 107. **Parties complainant.**—The rights of the two great classes—existing and subsequent—into which creditors are necessarily divided, having been considered,[1] the discussion would not be complete without noticing in detail the cases in which complainants in various capacities are allowed to prosecute the class of litigations under consideration. The principle must be kept constantly in view that fraudulent conveyances can be assailed only by those who have been injured,[2] and are voidable only in favor of parties occupy-

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[1] See Chaps. V., VI.

[2] Sides v. McCullough, 7 Mart. (La.) 654; s. c. 12 Am. Dec. 519; Hall v. Moriarty, 57 Mich. 345. A. conveyed to B. in fraud of creditors. A railroad company agreed to take the land and pay an award of damages. When sued for the amount of the award the company set up that B. derived title by fraud. The plea was held bad. Lacrosse & M. R.R. Co. v. Seeger, 4 Wis. 268. So a party with whom goods are deposited for safe keeping cannot set up fraud in the title, the court in one case saying: "We recognize the right of no man, in this way, to turn Quixote and fight against fraud, for justice sake alone. In the mouth, therefore, of this defendant, I do not perceive the right to set up this defense, even if it were true in fact." Hendricks v. Mount, 5 N. J. L. 738, 743. Compare Bell v. Johnson, 111 Ill. 374.

ing the positions of creditors[1] or subsequent purchasers.[2] The creditor who first institutes a suit in chancery to avoid a fraudulent conveyance is entitled to relief, without regard to other creditors standing in the same right, who have not made themselves joint parties with him,[3] or taken any proceedings. The creditors spoken of as entitled to discover equitable assets or annul covinous transfers, are the creditors of the grantor or donor making the fraudulent conveyance.[4] That a "fraud upon the public" was the design of the transfer is not a sufficient ground for avoiding it.[5] A fraudulent purpose is harmless if unattended with any wrongful effect.[6] Again, the fraudulent intent, as we shall show, must be connected with the transaction assailed, and not relate merely to some entirely independent act.[7] But it is not necessary that any particular creditor should be mentioned by name.[8]

It is well observed by Chancellor Kent, in Brown v. Ricketts,[9] that the question of parties is frequently perplexing and difficult to reduce to rule. The remark as will be manifest is peculiarly appropriate to the different actions and proceedings affecting fraudulent alienations. We may further state that suits by creditors form no exception to the rule which requires that all the parties in interest who are *in esse* shall be brought into the case.[10]

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[1] See Moseley v. Moseley, 15 N. Y. 334; Allenspach v. Wagner, 9 Col. 132; Burke v. Adams, 80 Mo. 504.

[2] Burgett v. Burgett, 1 Ohio 469; S. C. 13 Am. Dec. 634; Thompson v. Moore, 36 Me. 47; Jewell v. Porter, 31 N. H. 34; Byrod's Appeal, 31 Pa. St. 241.

[3] McCalmont v. Lawrence, 1 Blatchf. 235.

[4] See Chapter III. Morrison v. Atwell, 9 Bosw. (N. Y.) 503; Powers v. Graydon, 10 Bosw. (N. Y.) 630. A creditor's bill has been supported founded upon the judgment claim of a *cestui que trust*, against the personal representative of the trustee, to reach the proceeds of land sold by the trustee, which were held under a trust for the benefit of creditors. Diefendorf v. Spraker, 10 N. Y. 246.

[6] Griffin v. Doe *d.* Stoddard, 12 Ala. 783.

[7] Buford v. Keokuk N. L. Packet Co., 3 Mo. App. 159.

[8] Wilson v. Forsyth, 24 Barb. (N. Y.) 128.

[9] Blount v. Costen, 47 Ga. 534.

[9] 3 Johns. Ch. (N. Y.) 555.

[10] Bowen v. Gent, 54 Md. 555.

§ 108. **Joinder of complainants.**—Let us first notice the authorities relating to the joinder of complainants in the various forms of actions instituted by creditors. Parties who are creditors by several judgments may, as a general rule, join as complainants in an action to reach property fraudulently alienated by a debtor.[1] In Robbins v. Sand Creek Turnpike Co.,[2] the court quoted the following language approvingly: "Several persons having a common interest arising out of the same transaction or subject of litigation, though their interests be separate, may join in one suit for equitable relief, provided their interests be not adverse or conflicting. . . . . And several judgment-creditors, holding different judgments, may unite in filing a creditors' bill to reach the equitable interests and choses in action of the debtor, or to obtain the aid of the court to enforce their liens at law." And in Powell v. Spaulding[3] the doctrine is laid down to the effect that "where there is unity in interest, as to the object to be obtained by the bill, the parties seeking redress in chancery may join in the same complaint and maintain their action together."[4] In Brinkerhoff v.

[1] Buckingham v. Walker, 51 Miss. 494; Butler v. Spann, 27 Miss. 234; Sage v. Mosher, 28 Barb. (N. Y.) 287; Snodgrass v. Andrews, 30 Miss. 472; North v. Bradway, 9 Minn. 183; Dewey v. Moyer, 72 N. Y. 74; Simar v. Canaday, 53 N. Y. 305; Bauknight v. Sloan, 17 Fla. 286; Ballentine v. Beall, 4 Ill. 203; White's Bank of Buffalo v. Farthing, 9 Civ. Pro. (N. Y.) 64; S. C. 101 N. Y. 344; Higby v. Ayres, 14 Kans. 331; Chapman v. Banker & Tradesman Pub. Co., 128 Mass. 478; Gates v. Boomer, 17 Wis. 455; Wall v. Fairley, 73 N. C. 464; Reed v. Stryker, 4 Abb. App. Dec. (N. Y.) 26; Murray v. Hay, 1 Barb. Ch. (N. Y.) 59. But compare Yeaton v. Lenox, 8 Pet. 123; Seaver v. Bigelows, 5 Wall. 208. Judgment-creditors cannot thus unite in an action at law. Sage v. Mosher, 28 Barb. (N. Y.) 288. Compare Carroll v. Aldrich, 17 Vt. 569. The court decided, in Elmore v. Spear, 27 Ga. 196, that where a creditor proposed to reach legal as distinguished from equitable assets, the suit technically was not a creditors' bill. Hence a single creditor was held to be entitled to institute a suit to reach legal assets, and if he thereby gained a priority over other creditors it was said he could retain this advantage, and was not forced to divide with the others, but was entitled to the control of his own case, and could not be required to make other creditors parties to his bill. See §§ 54, 55.

[2] 34 Ind. 461. See Bank of Rome v. Haselton, 15 B. J. Lea (Tenn.) 216.

[3] 3 Greene (Iowa) 443, 461.

[4] See Strong v. Taylor School Township, 79 Ind. 208. In Hamlin v. Wright,

Brown,[1] Chancellor Kent ruled that different creditors might unite in one bill, the object of which was to set aside a fraudulent conveyance of their common debtor. It was so held also in McDermutt v. Strong,[2] Edmeston v. Lyde,[3] Conro v. Port Henry Iron Co.,[4] Wall v. Fairley,[5] and Mebane v. Layton.[6] And where a defendant in two separate bills, brought by different judgment-creditors to reach the same land, files one answer to both bills, it seems that he thereby virtually consolidates the suits, and they may be heard together as one cause, or as two causes under one style, without entering any specific order of consolidation.[7] In one case a sheriff and the judgment-creditor under whose execution a levy had been made were allowed to join in a creditors' bill.[8] Each it was said had an interest in preventing a multiplicity of suits, and in closing the matter in a single controversy; their interests were in harmony, and in no respect conflicting, and hence of such character as entitled them to unite in the suit.[9] There is, however, no obligation upon judgment-creditors to join.[10] Creditors by judgment and by decree may unite in one suit,[11] but judgment creditors and simple contract creditors cannot join.[12]

Where one party is a creditor by judgment and another by decree, both having acquired liens upon the property of their debtor which entitle them to similar relief against an act of the defendant, which is a common injury, they may join in a bill.[13] The general theory upon which creditors

23 Wis. 494, the court observe that "different judgment-creditors may join in one suit against the judgment-debtor and his fraudulent grantees, though the interests of the latter are separate and distinct, and were not acquired at the same time. The object of such a suit is to reach the property of the debtor."

[1] 6 Johns. Ch. (N. Y.) 139.

[2] 4 Johns. Ch. (N. Y.) 687.

[3] 1 Paige (N. Y.) 637.

[4] 12 Barb. (N. Y.) 27.

[5] 73 N. C. 464.

[6] 86 N. C. 571.

[7] Rodgers v. Dibrell, 6 Lea (Tenn.) 69.

[8] Adams v. Davidson, 10 N. Y. 309. 315. See § 81.

[9] Compare Bates v. Plonsky, 28 Hun (N. Y.) 112.

[10] White's Bank of Buffalo v. Farthing, 9 Civ. Pro. (N. Y.) 64.

[11] Brown v. Bates, 10 Ala. 432.

[12] Bauknight v. Sloan, 17 Fla. 284.

[13] Clarkson v. De Peyster, 3 Paige (N. Y.) 320.

are permitted to unite as complainants is that they are seeking payment of their judgments out of a common fund, viz., the property of the debtor; his fraudulent conduct with reference to his assets affects them all, and is the subject-matter of investigation. A receiver is often appointed to reach and take possession of equitable interests or property fraudulently alienated, and as he can act equally well for the different creditors, the expense, delay, and confusion incident to conducting different suits are avoided.[1] A judgment-creditor of a firm who is also a judgment-creditor of one of the members of the firm may sue on both judgments to overturn an assignment.[2]

Obviously, hostile claimants cannot join in any form of action,[3] and a bill is demurrable where it appears that one of the complainants has no standing in court, or antagonistic causes of action are set forth, or the relief for which the complainants respectively pray in regard to a portion of the property sought to be reached, involves totally distinct

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[1] See Gates v. Boomer, 17 Wis. 455; Hamlin v. Wright, 23 Wis. 491; Ruffing v. Tilton, 12 Ind. 259; Baker v. Bartol, 6 Cal. 483; Pierce v. Milwaukee Construction Co., 38 Wis. 253; Dewey v. Moyer, 72 N. Y. 74; s. c. below, 9 Hun (N. Y.) 476; Higby v. Ayres, 14 Kansas 331; Buckingham v. Walker, 51 Miss. 494. In Smith v. Schulting, 14 Hun (N. Y.) 54, the court say: "The principal issue presented by this complaint is the invalidity of the alleged release. It is manifest by the admissions of the complaint itself, that unless the release be set aside there can be no recovery of the indebtedness to the several firms. They have a common interest, therefore, in this principal issue, and inasmuch as the release is, or under the allegations of the complaint must be assumed to be, a joint one, obtained by a common fraud, there is no reason why all the parties to it may not unite in an action brought for the purpose of declaring it void, and setting it aside because of a common fraud practiced upon them in obtaining it. We think it comes directly within the principle of the cases cited by appellant's counsel, and although the plaintiffs were unconnected parties with respect to the indebtedness to them, they may join in the suit because there was one connected interest among them all centering in the principal point in issue." Citing Binks v. Rokeby, 2 Madd. 234; Ward v. Northumberland, 2 Anstr. 469, 477; Whaley v. Dawson, 2 Sch. & Lef. 370.

[2] Genesee County Bank v. Bank of Batavia, 43 Hun (N. Y.) 295.

[3] See Hubbell v. Lerch, 58 N. Y. 237; St. John v. Pierce, 22 Barb. (N. Y.) 362, affi'd in Court of Appeals, 4 Abb. App. Dec. (N. Y.) 140; Sedg. & Wait on Trial of Title to Land, 2d ed., § 188.

questions requiring different evidence and leading to different decrees.[1]

§ 109. **Suing on behalf of others.**—Mr. Pomeroy says:[2] "One creditor may sue on behalf of all the other creditors in an action to enforce the terms of an assignment in trust for the benefit of creditors, to obtain an accounting and settlement from the assignee, and other like relief; also, in an action to set aside such an assignment on the ground that it is illegal and void; and also one judgment-creditor may sue on behalf of all other similar creditors in an action to reach the equitable assets, and to set aside the fraudulent transfers of the debtor. In all these classes of cases the creditors have a common interest in the questions to be determined by the controversy."[3] The complainant may sue alone or with other judgment-creditors.[4] It is remarked by Nelson, J., in Myers v. Fenn,[5] that "the practice of permitting judgment-creditors to come in and make themselves parties to the bill, and thereby obtain the benefit, assuming at the same time their portion of the costs and expenses of the litigation, is well settled";[6] but this intention must be manifested by suitable averments in the bill;[7] and if, after a finding of a court annulling a fraudulent

[1] Walker v. Powers, 104 U. S. 245. Compare Emans v. Emans, 14 N. J. Eq. 114; Sawyer v. Noble, 55 Me. 227. The creditor may proceed by ancillary proceedings in any other court of concurrent jurisdiction with the court rendering the judgment, to remove clouds from the titles of any property which is deemed to be subject to the lien of the judgment. Each judgment makes a separate cause of action. Scottish-American Mortgage Co. v. Follansbee, 14 Fed. Rep. 125.

[2] Pomeroy's Remedies & Remedial Rights, § 394. See Pfohl v. Simpson, 74 N. Y. 137.

[3] See Greene v. Breck, 10 Abb. Pr. (N. Y.) 42; Brooks v. Peck, 38 Barb. (N. Y.) 519; Innes v. Lansing, 7 Paige (N. Y.) 583; Conro v. Port Henry Iron Co., 12 Barb. (N. Y.) 59; Hammond v. Hudson River I. & M. Co., 20 Barb. (N. Y.) 378; Chewett v. Moran, 17 Fed. Rep. 820; Ponsford v. Hartley, 2 Johns. & H. 736; Ballentine v. Beall, 4 Ill. 203; Terry v. Calnan, 4 S. C. 508.

[4] Marsh v. Burroughs, 1 Woods 467, and cases cited.

[5] 5 Wall. 207.

[6] Compare Strike v. McDonald, 2 H. & G. (Md.) 192; Shand v. Hanley, 71 N. Y. 324; Barry v. Abbot, 100 Mass. 396; Neely v. Jones, 16 W. Va. 625.

[7] Burt v. Keyes, 1 Flipp. 72.

preference, other creditors seek to come in as co-complainants, they may be allowed to do so, but their demands will be postponed in favor of the original complainant.[1]

Stockholders may sue in the right of the corporation where the latter refuses to proceed;[2] but where there is unreasonable delay in bringing the suit, the cause of action may be defeated by the application of the doctrine of equitable estoppel.[3] "Where one incurs expense in rescuing property belonging to many, a court of equity has power unquestionably to direct that the expenses so incurred shall be paid from the common fund."[4]

§ 110. **"And others."**—It is a mistake to suppose that the statute of Elizabeth only avoids deeds and conveyances coming within its exact provisions as to creditors. The statute is much broader in its operation.[5] It enacts that every conveyance made to the end purpose and intent to delay, hinder, or defraud creditors *and others* of their just and lawful actions, etc., shall be void. "It extends not only to creditors, but to *all others* who have cause of action or suit, or any penalty or forfeiture"; and, as we shall see, embraces claims for slander, trespass, and other torts.[6] The claimant may not come within a sharply defined meaning of the word "creditor," but he may maintain his standing "in the equity of creditors."[7] So in Feigley v. Feigley,[8] the court say: "The statute seems to design to embrace others than those who are strictly and technically cred-

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[1] Smith v. Craft, 11 Biss. 340.

[2] Taylor v. Holmes, 127 U. S. 492; Hawes v. Oakland, 104 U. S. 450; Greaves v. Gouge, 69 N. Y. 157; Wait on Insolvent Corps. § 74.

[3] Sheldon Hat Blocking Co. v. Eickemeyer Hat Blocking Machine Co., 90 N. Y. 607.

[4] Merwin v. Richardson, 52 Conn. 223, 237.

[5] See § 16.

[6] Gebhart v. Merfeld, 51 Md. 325. See Cooke, Garn. v. Cooke, 43 Md. 523; Sexton v. Wheaton, 1 Am. Lea. Cas. 42, notes; Jackson v. Myers, 18 Johns. (N. Y.) 425; Lillard v. McGee, 4 Bibb (Ky.) 165; Lowry v. Pinson, 2 Bailey's (S. C.) Law 324, 328, and other cases there cited.

[7] Shontz v. Brown, 27 Pa. St. 131.

[8] 7 Md. 561.

itors; and if, under such a comprehensive clause as 'creditors and others,' a wife, who has been made the victim of her husband's fraud, is not to be included, we are at a loss to ascertain to whom else it was designed to relate."[1] Then the principle that a voluntary post-nuptial settlement made by a person indebted is *prima facie* fraudulent, as to creditors, applies as well in behalf of the representatives of a deceased partner as of general creditors;[2] and a partner who liquidates firm judgments stands in the position of a creditor with regard to fraudulent alienations of his co-partner.[3]

§ 111. Surety.—Sureties on an appeal bond may be subrogated to the rights of the judgment-creditor, to bring a creditor's action to set aside fraudulent deeds,[4] even though the principal informed the sureties of the fraud before they became bound.[5] Sureties may enforce their rights in the creditor's name if their interests require it,[6] for "a surety who pays a debt for his principal is entitled to be put in the place of the creditor, and to all the means which the creditor possessed to enforce payment against the principal debtor."[7] It may be here recalled that a surety is a cred-

[1] See Welde v. Scotten, 59 Md. 72.

Conveyance to defeat alimony.—In Bailey v. Bailey, 61 Me. 363, the court very properly ruled that if an estate was conveyed to prevent the enforcement of a decree awarding alimony, or other proper aid, such conveyance was fraudulent as to the wife and might be avoided. It was contended on the part of the husband that a person in the situation of the wife could not be regarded as a creditor so as to come within the statutes of Elizabeth relating to fraudulent conveyances. The court decided, however, that the statute covered creditors *and others*, and cited Livermore v. Boutelle, 11 Gray (Mass.) 217, a similar case, in which the court said: "If she was not a creditor she was of the others whose just and lawful actions, suits, and reliefs would be delayed, hindered, or defeated by such conveyance." See Green v. Adams, 59 Vt. 602; Foster v. Foster, 56 Vt. 546; Burrows v. Purple, 107 Mass. 428; Morrison v. Morrison, 49 N. H. 69.

[2] Alston v. Rowles, 13 Fla. 118.

[3] Swan v. Smith, 57 Miss. 548.

[4] See Lewis v. Palmer, 28 N. Y. 271; Hinckley v. Kreitz, 58 N. Y. 590.

[5] Martin v. Walker, 12 Hun (N. Y.) 53.

[6] Townsend v. Whitney, 75 N. Y. 425; aff'g 15 Hun (N. Y.) 93. Compare Cuyler v. Ensworth, 6 Paige (N. Y.) 32; Speiglemyer v. Crawford, 6 Paige (N. Y.) 254.

[7] Lewis v. Palmer, 28 N. Y. 271.

itor of the principal obligor, and of his co-sureties from the time the obligation is entered into,[1] and that a conveyance by a surety for inadequate consideration to defeat a contemplated liability for contribution to a co-surety will be set aside.[2] A person who pays a debt as security for a firm becomes a creditor of the firm and is not entitled to any greater rights than simple contract creditors.[3]

§ 112. **Executors and administrators.**—Ordinarily an executor or administrator will not be allowed to impeach the fraudulent conveyance of his testator or intestate. Like the heirs he is bound by the acts of the deceased.[4] "As a party to a fraudulent conveyance cannot allege its illegality, with a view to its avoidance, so neither can his heirs nor representatives, coming in as volunteers, and standing, as it were, in his shoes."[5] This language is employed in Rhode Island: "If the deceased has conveyed his estates away in fraud of his creditors, the creditors who have been defrauded are the proper parties to prosecute the remedy."[6] Statutory changes supported by the tendency of the courts

[1] Pennington v. Seal, 49 Miss. 525; Williams v. Banks, 11 Md. 242; Sexton v. Wheaton, 1 Am. Lea. Cas. 37; Rider v. Kidder, 10 Ves. 360. See § 90.

[2] Pashby v. Mandigo, 42 Mich. 172.

[3] McConnel v. Dickson, 43 Ill. 99. Chief-Justice Thurman said, in a case in Ohio: "A surety against whom judgment has been rendered, may, without making payment himself, proceed, in equity, against his principal, to subject the estate of the latter to the payment of the debt." Hale v. Wetmore, 4 Ohio St. 600. See McConnell v. Scott, 15 Ohio 401; Horsey v. Heath, 5 Ohio 354; Stump v. Rogers, 1 Ohio 533.

[4] Blake v. Blake, 53 Miss. 193; Merry v. Fremon, 44 Mo. 522; Zoll v. Soper, 75 Mo. 462; Davis v. Swanson, 54 Ala. 277; George v. Williamson, 26 Mo. 190; Loomis v. Tifft, 16 Barb. (N. Y.) 545; Van Wickle v. Calvin, 23 La. Ann. 205; Choteau v. Jones, 11 Ill. 319; Snodgrass v. Andrews, 30 Miss. 472; Peaslee v. Barney, 1 D. Chip. (Vt.) 331; Hawes v. Loader, Yelv. 196; Livingston v. Livingston, 3 Johns. Ch. (N. Y.) 148; Estes v. Howland, 15 R. I. 128; Burton v. Farinholt, 86 N. C. 260.

[5] McLaughlin v. McLaughlin, 16 Mo. 242. See Hall v. Callahan, 66 Mo. 316; Beebe v. Saulter, 87 Ill. 518; Crawford v. Lehr, 20 Kans. 509; Rhem v. Tull, 13 Ired. Law (N. C.) 57. It has been held in New York, that a surrogate had no jurisdiction to determine the validity of such a transfer. Richardson v. Root, 19 Hun (N. Y.) 473; Barton v. Hosner, 24 Hun (N. Y.) 468.

[6] Estes v. Howland, 15 R. I. 129.

to prevent the confusion incident to splitting up the administration of estates between creditors and personal representatives, have led to the general establishment of the practice of permitting and imposing the duty upon executors and administrators to sue for property fraudulently alienated by the deceased in his lifetime.[1] Thus in New York, executors and administrators, who could not formerly effectually impeach the conveyances of the deceased on the ground of fraud against creditors, are now enabled to do so by statute.[2] This new remedy, however, is not exclusive. In that State, if the personal representative is in collusion with the fraudulent vendee, the creditors may bring an action against the personal representative and vendee to have the covinous transfer set aside, and the property applied as assets.[3] And in Wisconsin the creditor may in a proper case compel the executor or administrator to bring the action, or bring it himself.[4] In Pennsylvania it is said that the administrator's intervention would not seem to be necessary if the creditors prefer to proceed for themselves.[5] But it seems in such a case, in New York, that the creditor must ordinarily first exhaust

[1] See Martin v. Root, 17 Mass. 222; Welsh v. Welsh, 105 Mass. 229; Gibson v. Crehore, 5 Pick. (Mass.) 154; Hills v. Sherwood, 48 Cal. 392; McKnight v. Morgan, 2 Barb. (N. Y.) 171; Morris v. Morris, 5 Mich. 171; McLane v. Johnson, 43 Vt. 48; Parker v. Flagg, 127 Mass. 30; Bouslough v. Bouslough, 68 Pa. St. 495; Bushnell v. Bushnell, 88 Ind. 403; Cross v. Brown, 51 N. H. 486; also note to Ewing v. Handley, 14 Am. Dec. 157; Barton v. Hosner, 24 Hun (N. Y.) 468; Johnson v. Jones, 79 Ind. 141; Holland v. Cruft, 20 Pick. (Mass.) 321; Martin v. Bolton, 75 Ind. 295; German Bank v. Leyser, 50 Wis. 258; Garner v. Graves, 54 Ind. 188; Forde v. Exempt Fire Co., 50 Cal. 299; Norton v. Norton, 5 Cush. (Mass.) 524; Sullice v. Gradenigo, 15 La. Ann. 582; note to Hudnal v. Wilder, 17 Am. Dec. 744; S. C. 4 McCord's (S. C.) Law 294; Bassett v. McKenna, 52 Conn. 437.

[2] Moseley v. Moseley, 15 N. Y. 336; Bate v. Graham, 11 N. Y. 237; Barton v. Hosner, 24 Hun (N. Y.) 469; Bryant v. Bryant, 2 Rob. (N. Y.) 612; Southard v. Benner, 72 N. Y. 427; McKnight v. Morgan, 2 Barb. (N. Y.) 171; Lore v. Dierkes, 19 J. & S. (N. Y.) 144.

[3] Phelps v. Platt, 50 Barb. (N. Y.) 430; Sharpe v. Freeman, 45 N. Y. 802; Bate v. Graham, 11 N. Y. 237; Barton v. Hosner, 24 Hun (N. Y.) 468. See §§ 114 and 115.

[4] German Bank v. Leyser, 50 Wis. 258.

[5] Appeal of Fowler, 87 Pa. St. 454.

his legal remedies, and reduce his claim to judgment;[1] and in Wisconsin the insufficiency of the estate to pay debts must first be ascertained by the county court.[2] This prerequisite, as already shown,[3] is not universally conceded to be essential. The Supreme Court of the United States asserts, in a comparatively recent case (1879),[4] that the authorities are abundant and well settled, that a creditor of a deceased person has a right to go into a court of equity for the discovery of assets, and to secure the payment of the debt; and the creditor, when there, would not be turned back to a court of law to establish his debt. The court being in rightful possession of the cause for a discovery and account, will proceed to a final decree upon all the merits.[5] So debts which are made by statute a lien upon lands of a deceased debtor, will furnish a creditor at large, the correctness of whose claim is acknowledged by the executor, a standing in court to file a creditors' bill to set aside conveyances alleged to have been made by the testator in fraud of creditors.[6]

The creditors' bill in Kennedy v. Creswell,[7] was filed against an executor and devisees, and alleged that the complainant held the testator's notes for $12,000; and recited that the personal assets were insufficient to meet the debts, and that the executor was paying some of the claims in full, and leaving others unsatisfied. The creditors prayed for an accounting of the personal estate, a discovery of the real estate, and an application of all the property to the payment of the debts. A plea was interposed setting forth that the executor had assets sufficient to pay the complain-

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[1] Estes v. Wilcox, 67 N. Y. 264. *Contra*, Johnson v. Jones, 79 Ind. 141; Appeal of Fowler, 87 Pa. St. 449; Shurts v. Howell, 30 N. J. Eq. 418; Spencer v. Armstrong, 12 Heisk. (Tenn.) 707; Offutt v. King, 1 MacAr. (D. C.) 314. See § 79, *supra*.

[2] German Bank v. Leyser, 50 Wis. 258.

[3] § 79.

[4] Kennedy v. Creswell, 101 U. S. 645.

[5] Thompson v. Brown, 4 Johns. Ch. (N. Y.) 619. See § 79.

[6] Haston v. Castner, 31 N. J. Eq. 697, and cases cited. See § 87.

[7] 101 U. S. 641.

ant and all other creditors. A replication was filed and proofs taken, which sustained the allegations of the bill, and demonstrated the falsity of the plea. The court decided that the complainant was entitled to a decree *pro confesso*,[1] and the defendant could not claim the right to answer after interposing a false plea; that the admission of the executor that he had assets, could "be taken against him for the purpose of charging him with a liability," but it could not "serve him as evidence to prove the truth of his plea."

§ 113. — The personal representative may render himself individually liable to creditors for a failure to recover property fraudulently alienated by the testator or intestate,[2] and he should include such property in the inventory,[3] unless, of course, he has no knowledge of it.[4] The personal representative, as he stands for creditors when so acting, can only attack fraudulent transfers in cases where the estate is insolvent,[5] and with a view to recover a sum sufficient to satisfy the creditors. The complaint should allege that the action is instituted for the benefit of creditors.[6] The legislation clothing personal representatives with the power to appeal to the courts to annul covinous alienations made by the deceased, is highly salutary in practice. The concurrent right of the creditor to seek redress is also of the utmost importance, for the personal representative is usually selected by, or is a near relative of, the deceased,

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[1] See Dows v. McMichael, 2 Paige (N. Y.) 345.

[2] Lee v. Chase, 58 Me. 436; Cross v. Brown, 51 N. H. 488; Danzey v. Smith, 4 Texas 411.

[3] Minor v. Mead, 3 Conn. 289; Bourne v. Stevenson, 58 Me. 504; Booth v. Patrick, 8 Conn. 106; Andruss v. Doolittle, 11 Conn. 283.

[4] Booth v. Patrick, 8 Conn. 106. In Alabama an administrator has such a right to the lands of his intestate as will enable him to maintain a bill in equity for the cancellation of a conveyance of the lands obtained by fraud, provided the heirs are made parties. Waddell v. Lanier, 62 Ala. 347.

[5] Hess v. Hess, 19 Ind. 238; Pringle v. Pringle, 59 Pa. St. 281; Wall v. Provident Inst., 3 Allen (Mass.) 96.

[6] Crocker v. Craig, 46 Me. 327.

and may, in some cases, be prompted by motives of friendship or self-interest to shield the parties who have depleted the estate; and, in some instances, is himself the fraudulent alience. Where the personal representatives sue, a multiplicity of suits is prevented in cases where the creditors are numerous, and the necessity of a judgment or execution is avoided,[1] features important to the body of creditors.[2]

§ 114. **Assignee in bankruptcy.**—An assignee in bankruptcy, under the late bankrupt act, represented the whole body of creditors, and could in their behalf impeach, as fraudulent, a conveyance of property by the bankrupt, whenever the creditors might, by any process, acquire the right to contest its validity. This rule is of quite general application.[3] It is said, however, in the New York Court of Appeals,[4] that, "if the assignee should refuse or neglect to sue for and reclaim property fraudulently transferred, it is abundantly established that the creditors may commence an action to reach the property, making the assignee, the debtor, and his transferees parties defendant. And, in such an action, the property will be administered directly for the benefit of the creditors."[5] It is believed, however, that it

[1] Barton v. Hosner, 24 Hun (N. Y.) 471.

[2] Fletcher v. Holmes, 40 Me. 364.

[3] Southard v. Benner, 72 N. Y. 427; Platt v. Mead, 7 Fed. Rep. 95; Butcher v. Harrison, 4 Barn. & Adol. 129; Brackett v. Harvey, 25 Hun (N. Y.) 503; Nicholas v. Murray, 5 Sawyer 320; Trimble v. Woodhead, 102 U. S. 647; Bates v. Bradley, 24 Hun (N. Y.) 84; Doe *d.* Grimsby v. Ball, 11 M. & W. 531; Moyer v. Dewey, 103 U. S. 301; Ball v. Slafter, 26 Hun (N. Y.) 354; Phelps v. McDonald, 99 U. S. 298; Glenny v. Langdon, 98 U. S. 28; Shackleford v. Collier, 6 Bush (Ky.) 149; Badger v. Story, 16 N. H. 168; Day v. Cooley, 118 Mass. 527; Wadsworth v. Williams, 100 Mass. 126. The adjudication exempted the debtor's property from attachment. Williams v. Merritt, 103 Mass. 184. As to when an assignee in bankruptcy cannot overturn a fraudulent conveyance, see Warren v. Moody, 122 U. S. 132.

[4] Dewey v. Moyer, 72 N. Y. 78.

[5] Citing Sands v. Codwise, 2 Johns. (N. Y.) 487; Freeman v. Deming, 3 Sandf. Ch. (N. Y.) 327; Seaman v. Stoughton, 3 Barb. Ch. (N. Y.) 344; Fort Stanwix Bank v. Leggett, 51 N. Y. 552; Card v. Walbridge, 18 Ohio 411; Phelps v. Curtis, 80 Ill. 109; Francklyn v. Fern, Barn. Ch. 30; First

is impossible to reconcile this doctrine with the decisions of the United States Supreme Court,[1] for, according to the latter court, if the assignee in whom the right is vested neglected to prosecute during the two years allowed by the act, the right to attack the fraudulent transfer would be absolutely gone.[2] The assignee appointed under the act became vested with the title to the bankrupt's assets by an assignment from the court, into whose custody the estate was, in theory of law, intrusted. Even a claim in favor of the bankrupt against a foreign government passed to the assignee.[3] The assignee is regarded merely as a trustee for creditors. When his accounts are passed, and he is discharged, the property not disposed of reverts to the debtor by operation of law without reassignment.[4]

§ 115. General assignee.—It is a general rule of law that a person cannot, by any voluntary act of his own, transfer to another a right which he does not himself possess. A fraudulent transfer of property by a debtor, made with intent to defeat creditors, is, as we shall presently show, conclusive upon the debtor so that he cannot himself reclaim it. No logical theory can be easily framed upon which it can be said that an assignment, wholly voluntary on the debtor's part, vests in his assignee the right to attack fraud-

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Nat. Bank v. Cooper, 9 N. B. R. 529; Boone v. Hall, 7 Bush (Ky.) 66. See Bank v. Cooper, 20 Wall. 171; Sands v. Codwise, 4 Johns. (N. Y.) 536; Kidder v. Horrobin, 72 N. Y. 164; Bates v. Bradley, 24 Hun (N. Y.) 84.

[1] Compare Moyer v. Dewey, 103 U. S. 303; Trimble v. Woodhead, 102 U. S. 649; Glenny v. Langdon, 98 U. S. 20; Lowry v. Coulter, 9 Pa. St. 349; McMaster v. Campbell, 41 Mich. 514; McCartin v. Perry, 39 N. J. Eq. 201.

[2] Compare Bates v. Bradley, 24 Hun (N. Y.) 84; Allen v. Montgomery, 48 Miss. 101.

[3] Phelps v. McDonald, 99 U. S. 302; Comegys v. Vasse, 1 Pet. 195.

[4] See Dewey v. Moyer, 9 Hun (N. Y.) 480; Colie v. Jamison, 4 Hun (N. Y.) 284; Page v. Waring, 76 N. Y. 473, and cases cited; Boyd v. Olvey, 82 Ind. 294. In Stewart v. Platt, 101 U. S. 738, the court said: "In Yeatman v. Savings Institution, 95 U. S. 764, we held it to be an established rule that, 'except in cases of attachments against the property of the bankrupt within a prescribed time preceding the commencement of proceedings in bankruptcy, and except in cases where

ulent transfers.[1] Consequently, it has been decided that the right to impeach or set aside a mortgage which is fraudulent and void as against the creditors of the mortgagor, did not pass to an assignee of the mortgagor, by a voluntary general assignment in trust for the benefit of creditors, subsequently executed, and unaffected by any statute in force at the time.[2] Still, there are many States in which an assignment in insolvency or a voluntary assignment is held to vest in the assignee the right to avoid a conveyance made in fraud of creditors; and in some States the power is statutory.[3] Such an assignee may also set aside a mortgage or other conveyance which is void as to creditors, for want of registration, or other defects.[4] And

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the disposition of property by the bankrupt is declared by law to be fraudulent and void, the assignee takes the title subject to all equities, liens or incumbrances, whether created by operation of law or by act of the bankrupt, which existed against the property in the hands of the bankrupt.' Brown v. Heathcote, 1 Atk. 160; Mitchell v. Winslow, 2 Story 630; Gibson v. Warden, 14 Wall. 244; Cook v. Tullis, 18 Wall. 332; Donaldson v. Farwell, 93 U. S. 631; Jerome v. McCarter, 94 U. S. 734. He takes the property in the same 'plight and condition' that the bankrupt held it. Winsor v. McLellan, 2 Story 492."

[1] Pillsbury v. Kingon, 31 N. J. Eq. 619; Brownell v. Curtis, 10 Paige (N. Y.) 210; Storm v. Davenport, 1 Sandf. Ch. (N. Y.) 135; Sere v. Pitot, 6 Cranch 332; Estabrook v. Messersmith, 18 Wis. 545; Browning v. Hart, 6 Barb. (N. Y.) 91; Leach v. Kelsey, 7 Barb. (N. Y.) 466; Maiders v. Culver's Assignee, 1 Duv. (Ky.) 164; Carr v. Gale, 3 Woodb. & M. 68; Flower v. Cornish, 25 Minn. 473; S. C. 1 Am. Insolv. Rep. 184; Day v. Cooley, 118 Mass. 527.

[2] Flower v. Cornish, 25 Minn. 473.

[3] Hallowell v. Bayliss, 10 Ohio St. 537; Gibbs v. Thayer, 6 Cush. (Mass.) 30; Blake v. Sawin, 10 Allen (Mass.) 340; Freeland v. Freeland, 102 Mass. 475; Spring v. Short, 12 Weekly Dig. (N. Y.) 360, affi'd 90 N. Y. 544; Lynde v. McGregor, 13 Allen (Mass.) 172; Waters v. Dashiell, 1 Md. 455; Simpson v. Warren, 55 Me. 18; Shipman v. Ætna Ins. Co., 29 Conn. 245; Shirley v. Long, 6 Rand. (Va.) 735; Clough v. Thompson, 7 Gratt. (Va.) 26; Staton v. Pittman, 11 Gratt. (Va.) 99; Doyle v. Peckham, 9 R. I. 21; Southard v. Benner, 72 N. Y. 424; McMahon v. Allen, 35 N. Y. 403; Moncure v. Hanson, 15 Pa. St. 385; Tams v. Bullitt, 35 Pa. St. 308. See 22 Alb. L. J. 60, 81; Kilbourne v. Fay, 29 Ohio St. 264.

[4] Rood v. Welch, 28 Conn. 157; Hanes v. Tiffany, 25 Ohio St. 549; *In re* Leland, 10 Blatchf. 503; Barker v. Smith, 12 N. B. R. 474. But see Williams v. Winsor, 12 R. I. 9; Dorsey v. Smithson, 6 H. & J. (Md.) 61; Van Heusen v. Radcliff, 17 N. Y. 580; Ball v. Slaften, 98 N. Y. 622.

in some cases it is held that the assignee may affirm such fraudulent conveyance, and thereby estop creditors from impeaching it.[1] In New York creditors cannot assail a fraudulent alienation so long as there is a valid assignment in force. The right of attack is vested by statute in the assignee.[2]

§ 116. Receivers.—Under the practice in New York, and in some of the other States, the receiver of a debtor may impeach fraudulent transfers.[3] The appointment confers upon him the right to set aside all transfers made by the debtor to defraud his creditors, which the creditors themselves could have avoided.[4] In Bostwick v. Menck,[5] it was decided that the right of a receiver representing creditors and acting in their behalf, was no greater than that of the creditors themselves; that the legal and equitable right of the creditors was limited to securing a judgment setting aside transfers as fraudulent only in so far as might be necessary to satisfy debts; and that, when this was accomplished, the receiver's duties, and consequently his powers, and his right to act further in behalf of the creditors, ceased as to the property that had been conveyed by the debtor.[6] The receiver stands in the place of the judgment-creditor.[7] In Olney v. Tanner,[8] after a careful examination of the authorities,[9] the conclusion is reached that a receiver appointed in

[1] Butler v. Hildreth, 5 Met. (Mass.) 49; Freeland v. Freeland, 102 Mass. 477; but see Matter of Leiman, 32 Md. 225; Dugan v. Vattier, 3 Blackf. (Ind.) 245.

[2] Loos v. Wilkinson, 110 N. Y. 209; Spring v. Short, 90 N. Y. 538; Crouse v. Frothingham, 97 N. Y. 105, 113; Laws of 1858, Chap. 314.

[3] Osgood v. Laytin, 48 Barb. (N. Y.) 463, aff'd 5 Abb. Pr. N. S. (N. Y.) 9; Hamlin v. Wright, 23 Wis. 492; Barton v. Hosner, 24 Hun (N. Y.) 469; Porter v. Williams, 9 N. Y. 142; Underwood v. Sutcliffe, 77 N. Y. 62; Dunham v. Byrnes, 36 Minn. 106

[4] A new receiver (Bowden v. Johnson, 107 U. S. 264), or an assignee of a bankrupt, may be substituted as plaintiff in the appellate courts.

[5] 40 N. Y. 386.

[6] See Manley v. Rassiga, 13 Hun (N. Y.) 290.

[7] Kennedy v. Thorp, 51 N. Y. 174. See Olney v. Tanner, 18 Fed. Rep. 636.

[8] 10 Fed. Rep. 113; affi'd 18 Fed. Rep. 636.

[9] See Rodman v. Henry, 17 N. Y.

supplementary proceedings cannot be held to be vested by virtue of his appointment with the title to property fraudulently conveyed by the judgment-debtor. The court will refuse to put him summarily in possession of the property covinously alienated; it will not authorize him to meddle with it, and will refuse to protect him in so doing. The receiver may, as we have seen, assail the covinous transfer by an action.[1] Grover, J., said, in Bostwick v. Menck:[2] "He (the receiver) acquires no right to the property (fraudulently assigned), by succession to the rights of the debtor; . . . . no rights (*i. e.* of property) other than those of the debtor are acquired. He does not acquire the legal title to such property by his appointment. That is confined to property then owned by the debtor; and the fraudulent transferee of property acquires a good title thereto as against the debtor, and all other persons, except the creditors of the transferrer. The only right of the receiver is, therefore, as trustee of the creditors. The latter have the right to set aside the transfer and to recover the property from the fraudulent holder; and the receiver is, by law, invested with all the rights of all the creditors represented by him in this respect."[3]

In New Jersey, a receiver, appointed by virtue of the statute providing a method for discovering the concealed property of a judgment-debtor,[4] can, in his official character,

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484; Lathrop v. Clapp, 40 N. Y. 333; Brown v. Gilmore, 16 How. Pr. (N. Y.) 527; Teller v. Randall, 40 Barb. (N. Y.) 242; Field v. Sands, 8 Bosw. (N. Y.) 685; Bostwick v. Menck, 40 N. Y. 383; Becker v. Torrance, 31 N. Y. 637.

[1] It is only through the instrumentality of an assignee, that a creditor can reach property fraudulently transferred by a bankrupt prior to adjudication. Olney v. Tanner, 18 Fed. Rep. 637; Glenny v. Langdon, 98 U. S. 20; Trimble v. Woodhead, 102 U. S. 647; Moyer v. Dewey, 103 U. S. 301. Where there is an assignee a receiver has no standing. Olney v. Tanner, 18 Fed. Rep. 637.

[2] 40 N. Y. 383.

[3] In New York the receiver takes title to the debtor's real property by virtue of his appointment. Cooney v. Cooney, 65 Barb. (N. Y.) 525; Fessenden v. Woods, 3 Bosw. (N. Y.) 556; Bostwick v. Menck, 40 N. Y. 384; Underwood v. Sutcliffe, 77 N. Y. 62.

[4] Revision of 1877, p. 393.

exhibit a bill in chancery to annul sales of such property or encumbrances upon it, on the ground that such sales or encumbrances are in fraud of creditors.[1] In the case first cited, Parker v. Browning[2] is quoted with approval. In the latter case, in speaking of the course to be taken, when property, which is claimed by a receiver appointed by the chancellor, is in the hands of a third party, who claims the right to retain it, Chancellor Walworth says: "The receiver must either proceed by suit, in the ordinary way, to try his right to it, or the complainant should make such third person a party to the suit, and apply to have the receivership extended to the property in his hands."[3] A sequestrator or receiver of personal property and rents appointed in an action may, under the direction of the court, test a fraudulent alienation of property[4] though this question is much confused in New York.[5]

§ 117. **Receivers of corporations.**—Receivers of insolvent corporations, when suing for portions of the capital, represent creditors, and not the corporation,[6] and are clothed

[1] Miller v. Mackenzie, 29 N. J. Eq. 292. But compare Higgins v. Gillesheiner, 26 N. J. Eq. 308.

[2] 8 Paige (N. Y.) 388.

[3] See Carr v. Hilton, 1 Curt. C. C. 230; Hamlin v. Wright, 23 Wis. 492; Bostwick v. Menck, 4 Daly (N. Y.) 68. Willard, J., in Porter v. Williams, 9 N. Y. 142, 150, said: "The act which the receiver seeks to avoid in this case was an illegal act of the debtor. The object of the action is to set aside an assignment made by the debtor with intent, as is alleged, to defraud the creditor under whose judgment and execution the plaintiff was appointed receiver, and the other creditors of the assignor. Such conveyance was void at common law, and is expressly forbidden by the statute. It is void as against the creditors of the party making it, though good as between him and his grantee. The plaintiff, representing the interests of the creditors, has a right to invoke the aid of the court to set aside the assignment. He stands in this respect, in the same condition as the receiver of an insolvent corporation, or as an executor or administrator, and like them can assail the illegal and fraudulent acts of the debtor whose estate he is appointed to administer."

[4] See Donnelly v. West, 17 Hun (N. Y.) 564; Foster v. Townshend, 2 Abb. N. C. (N. Y.) 29.

[5] See Foster v. Townshend, 68 N. Y. 203; Ogden v. Arnot, 29 Hun (N. Y.) 150; Keeney v. Home Ins. Co., 71 N. Y. 396; Fincke v. Funke, 25 Hun (N. Y.) 618.

[6] Osgood v. Ogden, 4 Keyes (N. Y.)

with other rights than those which the corporation possessed.[1] It is a fundamental principle, upon which the American cases at least proceed, that the capital of a corporation, especially after insolvency, is a trust fund for the benefit of creditors.[2] It is foreign to our purpose to enter into the wide field of corporation law relative to insolvency,[3] but the principles of these cases are valuable as showing that the representative, receiver, or liquidator of a corporation is, like an administrator, assignee, or receiver of a debtor, vested with the status of a creditor. Where a statute creates a cause of action in favor of creditors who are within certain prescribed conditions a receiver cannot enforce it.[4] It may be observed here that the power of the comptroller of the currency to wind up the affairs of a national bank in certain contingencies does not exclude the authority of a competent tribunal to appoint a receiver in other cases.[5]

§ 118. **Foreign receivers.**—In Booth v. Clark[6] the court say: "A receiver is appointed under a creditor's bill for one or more creditors, as the case may be, for their benefit, to the exclusion of all other creditors of the debtor, if there be any such. . . . . Whether appointed, as this receiver was, under the statute of New York, or under the rules and practice of chancery, as they may be, his official

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70; Ruggles v. Brock, 6 Hun (N. Y.) 164; Sawyer v. Hoag, 17 Wall. 610, 619; Webster v. Upton, 91 U. S. 65, 71; Chubb v. Upton, 95 U. S. 665, 667; Dayton v. Borst, 31 N. Y. 435; Wait on Insolv. Corps., Chap. X.

[1] Ruggles v. Brock, 6 Hun (N. Y.) 164; Upton v. Englehart, 3 Dillon, 496, 503; Osgood v. Ogden, 4 Keyes (N. Y.) 70, 88; Porter v. Williams, 9 N. Y. 142, 149; Osgood v. Laytin, 3 Keyes (N. Y.) 521; Gillet v. Moody, 3 N. Y. 479.

[2] Wood v. Dummer, 3 Mason 308; Sawyer v. Hoag, 17 Wall. 610; Hatch v. Dana, 101 U. S. 205; Dayton v. Borst, 31 N. Y. 435; New Albany v. Burke, 11 Wall. 96, 106; Upton v. Tribilcock, 91 U. S. 45, 47; Bartlett v. Drew, 57 N. Y. 587; Lamar Ins. Co. v. Moore, 1 Am. Insolv. Rep. 62; Wait on Insol. Corps., § 142.

[3] See Wait on Insolvent Corporations, Baker, Voorhis & Co., 1888.

[4] Farnsworth v. Wood, 91 N. Y. 308.

[5] Irons v. Manufacturers' Nat. Bank, 6 Biss. 301.

[6] 17 How. 338.

relations to the court are the same. A statute appointment neither enlarges nor diminishes the limitation upon his action. His responsibilities are unaltered. Under either kind of appointment he has at most only a passive capacity in the most important part of what it may be necessary for him to do, until it has been called by the direction of the court into ability to act. He has no extra-territorial power of official action; none which the court appointing him can confer, with authority to enable him to go into a foreign jurisdiction to take possession of the debtor's property; none which can give him, upon the principle of comity, a privilege to sue in a foreign court or another jurisdiction, as the judgment-creditor himself might have done, where his debtor may be amenable to the tribunal which the creditor may seek."[1] So in Brigham v. Ludding-ton,[2] which was a bill filed in the southern district of New York by a receiver appointed on a judgment-creditor's bill in the eastern district of Wisconsin, the suit was dismissed.[3] To the suggestion of counsel that, by the statutes of Wisconsin, receivers appointed on creditors' bills are vested with full title, and have full authority to maintain suits, which the Circuit Court of the United States for the southern district of New York ought to recognize, Mr. Justice Woodruff said: "(1). This receiver was appointed under and by virtue of the general power of courts of equity, and with such effect only as is due to the order of the court making the appointment. He was not appointed under or by virtue of any statute. (2). The statutes of the State of Wisconsin cannot enlarge or alter the effect of an order or decree of the Circuit Court of the United States, nor enlarge or modify the jurisdiction of that court or its efficiency."[4]

[1] See especially Olney v. Tanner, 10 Fed. Rep. 104, and cases cited.

[2] 12 Blatchf. 237.

[3] See Hope Mutual Life Ins. Co. v. Taylor, 2 Rob. (N. Y.) 278, 284.

[4] Citing Payne v. Hook, 7 Wall. 425.

A doctrine is growing up in favor of recognizing foreign receivers by comity.[1]

§ 119. **Creditors of corporations.** — Creditors of an indebted corporation may have the aid of a court of equity against the corporation and its debtors to compel the collection of what is due, and the payment of its debts.[2] In Graham v. Railroad Co.[3] will be found an important discussion, by the learned Mr. Justice Bradley, of the effect of a voluntary alienation of property by a corporation as affecting subsequent creditors. In this case counsel urged that the property of a corporation was a trust fund for creditors,[4] and that this meant all creditors becoming such during the life of the corporation. The court, however, could discover no reason why the disposal by a corporation of any portion of its assets should be questioned by subsequent creditors of the corporation, any more than a like disposal by an individual of his property should be so attacked.[5] This would seem to put corporations and individuals upon the same footing as to voluntary alienations, as regards a certain class of creditors; but the distinction must not be overlooked that the corporation itself may recover the property, where the voluntary or fraudulent transfer was effected by faithless or corrupt officials.

Creditors of a corporation who have exhausted their remedy at law, may proceed in equity to compel a stockholder to pay up a balance due upon a subscription.[6] So judgment-creditors of a corporation may follow corporate

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[1] National Trust Co. v. Miller, 33 N. J. Eq. 159; Bidlack v. Mason, 26 N. J. Eq. 230; National Trust Co. v. Murphy, 30 N. J. Eq. 408. Compare Matter of Waite, 99 N. Y. 433.

[2] Ogilvie v. Knox Ins. Co., 22 How. 380; 2d appeal, 2 Black 539; Hatch v. Dana, 101 U. S. 205.

[3] 102 U. S. 148.

[4] See Railroad Co. v. Howard, 7 Wall. 392; Sawyer v. Hoag, 17 Wall. 610; Dayton v. Borst, 31 N. Y. 435; Upton v. Tribilcock, 91 U. S. 45, 47; Bartlett v. Drew, 57 N. Y. 587. See § 117.

[5] See Chap. VI.

[6] Hatch v. Dana, 101 U. S. 205; Ogilvie v. Knox Ins. Co., 22 How. 380; Pierce v. Milwaukee Cons. Co., 38 Wis. 253.

assets into the hands of stockholders amongst whom it was divided before the debts of the association were paid.[1]

§ 120. **Sheriff.**—When process comes to his hands the sheriff may undoubtedly attach any property which has been transferred by an alleged fraudulent assignment, and hold it subject to the decision of the court upon the question of fraud. In such a case the sheriff must defend the seizure in behalf of the creditors, and show that the assignment was fraudulent as to them. As to creditors the title to such property does not pass if the assignment is fraudulent, but it remains liable to seizure to satisfy their debt.[2] The case is different when the assigned property has been sold by the vendee and its identity destroyed; the proceeds cannot be attached or levied upon by the sheriff as the debtor's property. Merely setting aside the assignment would not vest the title to such proceeds in the debtor. The only remedy of the creditor in such a case is to institute a creditor's suit, and fasten a *trust* upon such proceeds for the benefit of creditors, which necessarily confirms the legal title of the assignees to the assigned property, instead of annulling it, as would be the case if the sheriff had seized the assigned property instead of the proceeds.[3]

§ 121. **Heirs—Widow.**—The heir of a grantor cannot impeach his ancestor's deed on the ground that it was made in fraud of creditors,[4] for he can claim no right which the ancestor was estopped from setting up. The statutes avoiding fraudulent transfers are, as we have shown,[5] available

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[1] Bartlett v. Drew, 57 N. Y. 587.

[2] See Kelly v. Lane, 42 Barb. (N. Y.) 610. Compare Greenleaf v. Mumford, 4 Abb. Pr. N. S. (N. Y.) 134; Gross v. Daly, 5 Daly (N. Y.) 542; Rinchey v. Stryker, 28 N. Y. 45; Carr v. Van Hoesen, 26 Hun (N. Y.) 316. See § 81.

[3] Lawrence v. Bank of the Republic, 35 N. Y. 320. See Thurber v. Blanck, 50 N. Y. 83; Adams v. Davidson, 10 N. Y. 309, 315. See § 81. Compare Clark v. Foxcroft, 6 Me. 206, and Quincy v. Hall, 1 Pick. (Mass.) 357; s. c. 11 Am. Dec. 198.

[4] Moseley v. Moseley, 15 N. Y. 334. See Vance v. Schroyer, 79 Ind. 380.

[5] See Chap. III.; also § 107.

only to the person or persons who might be delayed, hindered, or defrauded.[1] The heir at law is not a proper party to enforce an alleged trust in personal property in favor of an intestate.[2] It may be here observed, though possibly extraneous to our general theme, that one of several heirs may maintain a suit to set aside a conveyance procured from the ancestor by means of the fraud and undue influence of the grantee, and that the other heirs may testify in the suit as to personal transactions with the deceased.[3]

A widow cannot sue in chancery to have her husband's lands sold, her dower right satisfied, and the balance applied to creditors;[4] nor can a widow who has knowingly joined in a fraudulent deed maintain a bill to set the transfer aside.[5]

§ 122. **Husband and wife.**—The relationship of husband and wife assumes considerable prominence in our subject and will be specially treated. We may here observe that a husband compelled to pay ante-nuptial debts of his wife becomes her creditor, and as such is entitled to set aside fraudulent conveyances made by her in contemplation of marriage;[6] so also a wife may attack conveyances executed by her husband with intent to defeat her right of dower which was about to attach.[7] "It seems to be well settled, that, pending a divorce suit, a wife asserting a just claim for alimony is, within the meaning of statutes prohibiting fraudulent conveyances, to be deemed a creditor."[8]

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[1] See Dutton v. Jackson, 2 Del. Ch. 86; Morrison v. Atwell, 9 Bosw. (N. Y.) 503; Powers v. Graydon, 10 Bosw. (N. Y.) 630. See *infra*, Chap. XXVI.

Legatees.—A legatee cannot avoid, on the ground of fraud, a transaction which was binding on his testator; Guidry v. Grivot, 2 Mart. N. S. (La.) 13; S. C. 14 Am. Dec. 193; but in Addison v. Bowie, 2 Bland's Ch. (Md.) 606, it is said, a legatee may in certain cases file a creditor's bill.

[2] Ware v. Galveston City Co., 111 U. S. 170.

[3] Smith v. Meaghan, 28 Hun (N. Y.) 423; Hobart v. Hobart, 62 N. Y. 80.

[4] Hull v. Hull, 26 W. Va. 1.

[5] Barnes v. Gill, 21 Ill. App. 129.

[6] Westerman v. Westerman, 25 O. S. 500; affirming S. C. 9 Am. Law Reg. (N. S.) 690.

[7] See § 70; also Chap. XX.

[8] Lott v. Kaiser, 61 Tex. 665, 673, citing Feigley v. Feigley, 7 Md. 538; Cla-

§ 123. **Tort creditor.**—A right to damages arising from a tort is within the protection of the statute 13 Eliz. c. 5,[1] and a conveyance made to defeat such right will be set aside.[2] If the intent was in part to evade fines upon criminal prosecution, and also to evade the payment of any judgment which might thereafter be obtained in the civil action, the conveyance would be wholly fraudulent. It cannot be upheld in part and avoided in part.[3] Hence it has been held that an action at law, although *in maleficio*, is within the meaning of the statute which protects "creditors *and others*" against conveyances made to defraud them of their just and lawful actions, suits, debts, accounts, damages, penalties, forfeitures, and demands.[4] The judgment-creditor in an action of trespass has a judgment for such a cause of action as justifies his attacking in some form any conveyance made by the defendant pending the suit, as being fraudulent against him, and should not be prevented by injunction from putting himself into such a position that he may have the question of the *bona fides* of the grantee's purchase tested in a court of law and before a jury through an action of ejectment.[5]

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gett v. Gibson, 3 Cranch C. C. 359; Boils v. Boils, 1 Coldw. (Tenn.) 285; Morrison v. Morrison, 49 N. H. 69; Turner v. Turner, 44 Ala. 438; Brooks v. Caughran, 3 Head (Tenn.) 465; Bouslough v. Bouslough, 68 Pa. St. 495; Frakes v. Brown, 2 Blackf. (Ind.) 295.

[1] Post v. Stiger, 29 N. J. Eq. 558. See Lillard v. McGee, 4 Bibb (Ky.) 165; Jackson v. Myers, 18 Johns. (N. Y.) 425; Farnsworth v. Bell, 5 Sneed (Tenn.) 531; Langord v. Fly, 7 Humph. (Tenn.) 585; Walradt v. Brown, 6 Ill. 397. See § 22.

[2] Scott v. Hartman, 26 N. J. Eq. 90; Jackson v. Myers, 18 Johns. (N. Y.) 425; Clapp v. Leatherbee, 18 Pick. (Mass.) 138; Fox v. Hills, 1 Conn. 295; Pendleton v. Hughes, 65 Barb. (N. Y.) 136; Barling v. Bishopp, 29 Beav. 417; Shean v. Shay, 42 Ind. 375; Bongard v. Block, 81 Ill. 186; Weir v. Day, 57 Iowa 87; Corder v. Williams, 40 Iowa 582; Harris v. Harris, 23 Gratt. (Va.) 737; Hoffman v. Junk, 51 Wis. 613; Westmoreland v. Powell, 59 Ga. 256. But compare Evans v. Lewis, 30 Ohio St. 11.

[3] Weir v. Day, 57 Iowa 87. See *infra*, Void and Voidable Acts.

[4] Scott v. Hartman, 26 N. J. Eq. 90; Jackson v. Myers, 18 Johns. (N. Y.) 425. See Leukener v. Freeman, Freem. Ch. Rep. 236; Fox v. Hills, 1 Conn. 295; Barling v. Bishopp, 29 Beav. 417. See § 110.

[5] Welde v. Scotten, 27 Alb. L. J. 337; S. C. 59 Md. 72. See Gebhart v.

§ 124. **Overseer of the poor.**—In New York an overseer of the poor has no standing in court before judgment to impeach the voluntary deed of the father of a lunatic child, upon the theory that the conveyance was executed with the intention of imposing the burden of supporting the son upon the town. It seems to be clear that an overseer cannot secure equitable relief setting aside a fraudulent transfer, if he is not a creditor by judgment or by simple contract; and no liability has been established in his favor, by adjudication or otherwise, against the alleged fraudulent grantor.[1]

§ 125. **Creditors having liens.**—A conveyance is not considered fraudulent as to a creditor whose debt is secured by judgment or other lien upon the land transferred. The grantee necessarily takes subject to the lien, and the creditor may pursue the land in the same manner as if it had been conveyed to one who had purchased in good faith for a full consideration. He may follow the land irrespective of changes in the title, whether honest or dishonest. A judicial sale upon his lien vests in the purchaser the title which the debtor had when the lien attached, and of course divests the title of the debtor's grantee. The creditor, therefore, stands in no need of aid from a court of equity to revoke the debtor's transfer.[2] This question was considered in Armington v. Rau,[3] in which Haak's Appeal[4] was cited with approval, and the court further said: "The debtor conveys subject to the lien. He has a right, upon such condition, to sell or give away his land, and if he does so fraudulently, the grantee's title is good against all the

Merfeld, 51 Md. 325; Bockes v. Lansing, 74 N. Y. 441; Freeman v. Elmendorf, 7 N. J. Eq. 475; Winch's Appeal, 61 Pa. St. 426; Moore v. Cord, 14 Wis. 413; Heywood v. City of Buffalo, 14 N. Y. 539; Townsend v. Mayor of New York, 77 N. Y. 542; Van Doren v. Mayor, etc., 9 Paige (N. Y.) 388.

[1] Bowlsby v. Tompkins, 18 Hun (N. Y.) 220.

[2] Haak's Appeal, 100 Pa. St. 62; Zuver v. Clark, 104 Pa. St. 226.

[3] 100 Pa. St. 168.

[4] 100 Pa. St. 62.

world, except creditors and persons intended to be hindered, delayed, or defrauded. A prior lien creditor is not such person. The conveyance, whether *bona fide* or fraudulent as respects creditors who have no liens, is no obstruction or hindrance to the enforcement of payment of the prior lien."

§ 126. **Purchaser removing incumbrances.**—A purchaser at execution sale takes the creditor's right to avoid all fraudulent conveyances and incumbrances,[1] and may file a bill in equity for that purpose.[2] A creditor who has obtained judgment and issued execution, may seize and sell the property of his debtor, and try the title of any one who sets up a prior lien or incumbrance affected with usury.[3]

[1] Gerrish v. Mace, 9 Gray (Mass.) 236; Orendorf v. Budlong, 12 Fed. Rep. 24; Hildreth v. Sands, 2 Johns. Ch. (N. Y.) 35; Best v. Staple, 61 N. Y. 78; Gallman v. Perrie, 47 Miss. 131. Chief-Justice Sherwood said: "The law is well settled in this State, that, where a debtor conveys his land with the fraudulent design above mentioned, a resulting trust is thereby created in favor of his creditors, and is the subject of execution sale. And it is equally well settled, that a purchaser at such sale will occupy as advantageous a position as though he were a creditor, when proceeding to set aside the debtor's conveyance on the ground of fraud." Ryland v. Callison, 54 Mo. 514.

[2] Gould v. Steinburg, 84 Ill. 170. See Hoxie v. Price, 31 Wis. 82–89. It appeared in this action that a deed of lands from defendants to a third person, and from him back to the wife, and a patent of certain other lands to the wife, were considered as fraudulent and void as to the husband's creditors. A purchaser of the land, at execution sale under a judgment against the husband, and before becoming entitled to the sheriff's deed, brought a suit to set aside the wife's deed and patent and to restrain her from incumbering the land. The suit was upheld upon the theory that the wife by alienating or incumbering the land to a *bona fide* purchaser or mortgagee, would absolutely defeat complainant's equitable rights. See Avery v. Judd, 21 Wis. 262; Phelan v. Boylan, 25 Wis. 679; Wood v. Chapin, 13 N. Y. 509. In Remington Paper Co. v. O'Dougherty, 81 N. Y. 481, the complainant was an execution purchaser; the time for redemption had expired as to the debtor but not as to other creditors. The purchaser was held to be possessed of an inchoate title and equitable interest sufficient to maintain an action for the cancellation of instruments or incumbrances which, within the doctrine of courts of equity, are considered as clouds upon title. See Hager v. Shindler, 29 Cal. 48.

[3] Dix v. Van Wyck, 2 Hill (N. Y.) 525; Mason v. Lord, 40 N. Y. 486. See Post v. Dart, 8 Paige (N. Y.) 639; reversed, 7 Hill (N. Y.) 391; Thompson v. Van Vechten, 27 N. Y. 568.

So a conveyance of property gives to the grantee or assignee the right to file a bill to annul a previous invalid conveyance made by the same grantor,[1] and a judgment-creditor may compel the cancellation of prior judgments against the debtor upon the ground that they have been paid.[2]

§ 127. **Creditors opposing will.**—As a general rule no creditor has the right to oppose the probate of a will.[3] The right of contest is limited to the heirs at law and next of kin.[4] It may be here observed that, in Fisher v. Bassett,[5] it is said that no debtor of an estate could be allowed "to plead *ne unques* administrator in bar of an action for the recovery of a debt due to the estate. The greatest confusion and mischief would ensue if such were the law; for then, wherever delay was desired, every debtor would deny the jurisdiction, and arrest the recovery of a just debt, by embarrassing inquiries as to the decedent's domicil or the place of his death."[6]

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[1] McMahon v. Allen, 35 N. Y. 403. See Dickinson v. Burrell, L. R. 1 Eq. 337. But compare Cockell v. Taylor, 15 Beav. 103; Anderson v. Radcliffe, E. B. & E. 806; Milwaukee & M. R.R. Co. v. Milwaukee & W. R.R. Co., 20 Wis. 174; Prosser v. Edmonds, 1 Y. & C. 481; French v. Shotwell, 5 Johns. Ch. (N. Y.) 555; especially, Graham v. Railroad Co., 102 U. S. 156.

[2] Shaw v. Dwight, 27 N. Y. 244.

[3] Menzies v. Pulbrook, 2 Curteis 845; Heilman v. Jones, 5 Redf. (N. Y.) 398; Elme v. Da Costa, 1 Phillim. 173.

[4] Taff v. Hosmer, 14 Mich. 249.

[5] 9 Leigh (Va.) 133.

[6] See Fosdick v. Delafield, 2 Redf. (N. Y.) 392; Drexel v. Berney, 1 Dem. (N. Y.) 163.

CHAPTER VIII.

PARTIES DEFENDANT.

§ 128. Debtor as defendant in creditors' actions.
129. When debtor not necessary defendant.
130. Defendants need not be equally guilty.
131. Fraudulent assignee or grantee must be joined.
132. Joining defendants.
132*a*. Conveyance pending suit.
§ 133. Assignee and receiver as defendant.
134. Objection as to non-joinder—How raised.
135. Misjoinder of causes of action.
136. Executors, administrators, heirs, and legatees.
137. Trustee and *cestui que trust*.
138. Party having lien.
139. Stockholders.

§ 128. **Debtor as defendant in creditors' actions.**—The doubts and difficulties incident to the selection or joinder of proper parties are not restricted to the class of complainants, but, on the contrary, cases of alleged misjoinder and non-joinder of defendants are frequently up for adjudication in different forms. As a general rule all persons participating in making a fraudulent conveyance are proper parties to a suit to set the transfer aside.[1] "It is a general rule that all parties interested in a controversy, or who may be affected by a decree rendered therein, should be made parties; all who are nominally or really interested may therefore be joined although the interests of all may not be affected alike by the relief which may be granted."[2] Let us briefly look through the authorities. The question of the necessity of joining the grantor or debtor as a party defendant in an action brought by a creditor to secure a discovery of assets, or cancel a fraudulent conveyance, is involved in some obscurity and confusion, and the authori-

[1] Miller v. Jamison, 24 N. J. Eq. 41. [2] Raynor v. Mintzer, 67 Cal. 164.

ties relating to the subject must be carefully distinguished and classified. Prof. Pomeroy says,[1] that "in an action by a judgment-creditor to reach equitable assets of the debtor in his own hands, or to reach property which has been transferred to other persons, or property which is held by other persons under such a state of facts that the equitable ownership is vested in the debtor, the judgment-debtor is himself an indispensable party defendant, and the suit cannot be carried to final judgment without him." This statement of the matter is, as we shall presently see, entirely too general and sweeping. In New York the necessity for making the debtor a party defendant is made to depend upon the nature of the particular proceeding. In Miller v. Hall[2] the action was brought to have an assignment of a bond and mortgage made by the debtor to the defendant declared fraudulent and void as to creditors. The New York Court of Appeals held that it was well settled, in the case of a creditors' bill to reach a chose in action, which was the character of the suit in question, the judgment-debtor was a necessary party. The earlier authorities show that the practice of joining the debtor prevailed.[3] In Shaver v. Brainard[4] the action was in the nature of a creditors' bill brought by a receiver to set aside a conveyance of real estate as fraudulent, and apply the proceeds upon the plaintiff's judgment. The grantor and judgment-debtor was not made a party defendant, and the judgment was reversed for that reason.[5] In another case, where a receiver filed a bill against a trustee of the debtor to reach equitable interests of the latter in a trust fund, the debtor was declared to be

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[1] Pomeroy on Remedies and Remedial Rights, § 347.

[2] 70 N. Y. 252; s. c. below, 40 N. Y. Supr. Ct. 266.

[3] Edmeston v. Lyde, 1 Paige (N. Y.) 637; Boyd v. Hoyt, 5 Paige (N. Y.) 65; Fellows v. Fellows, 4 Cow. (N. Y.) 682; Green v. Hicks, 1 Barb. Ch. (N. Y.) 309. See Wallace v. Eaton, 5 How. Pr. (N. Y.) 99.

[4] 29 Barb. (N. Y.) 25.

[5] See Allison v. Weller, 3 Hun (N. Y.) 608, affi'd 66 N. Y. 614; North v. Bradway, 9 Minn. 183.

a necessary party.[1] In Haines v. Hollister[2] the assignee of an insolvent firm, the personal representatives of a deceased partner, and the surviving partners, were held to be properly joined in a creditors' action to compel an accounting by the assignee, and to recover of the representatives the balance of the plaintiffs' claims. In Lawrence v. Bank of the Republic[3] the court observed: "In a creditors' suit against a judgment-debtor to set aside a prior assignment made by him in trust for the benefit of creditors, on the ground of fraud, he is a necessary party. Indeed he must be deemed the principal party, otherwise different persons, claiming portions of the assignee's property, could not be joined as defendants. The common point of litigation is the alleged fraudulent transfer of the property."[4] The case of Gaylords v. Kelshaw[5] is sometimes cited[6] as an authority for the proposition that in any form of action to annul a conveyance as fraudulent the debtor must be summoned. The court said that the debtor was properly made defendant to the suit, as it was a debt which he owed which the creditor sought to collect, and it was his insolvency that was to be established, and his fraudulent conduct that required investigation. It was expressly held, however, that it was not necessary to decide whether the suit could proceed without him, because as matter of fact he had been found in the district and had answered the bill. Miller, J., said: "It is simply the case of a person made a defendant by the bill, who is also a proper [the court did not say necessary] defendant, according to the principles which govern courts of chancery as to parties, and who has been served with process within the district and answered the bill; but whose

[1] Vanderpoel v. Van Valkenburgh, 6 N. Y. 190. See Voorhis v. Gamble, 6 Mo. App. 1; Lawrence v. Bank of the Republic, 35 N. Y. 320; Beardsley Scythe Co. v. Foster, 36 N. Y. 561; Miller v. Hall, 70 N. Y. 252.

[2] 64 N. Y. 1.

[3] 35 N. Y. 324.

[4] See Beardsley Scythe Co. v. Foster, 36 N. Y. 566.

[5] 1 Wall. 81.

[6] See Taylor v. Webb, 54 Miss. 42.

citizenship is not made to appear in such a manner that the court can take jurisdiction of the case as to him."

In an action for unpaid subscriptions a judgment-creditor may join all the stockholders, or if they are too numerous he should so allege in the bill;[1] and the corporation may be joined.[2]

§ 129. **When debtor not necessary defendant.**—Fox v. Moyer[3] is an illustration of a case in which the debtor is not a necessary party defendant. The plaintiff was a judgment-creditor with execution returned unsatisfied. He claimed that his judgment was a lien upon certain real estate which one of the judgment-debtors had fraudulently conveyed to the defendant, and he commenced this action to have the cloud resting on the lien of his judgment removed, and to have his judgment satisfied out of this land, notwithstanding the conveyance. Earl, C., in delivering the opinion of the New York Commission of Appeals, said: "The conveyance was good, as between the parties thereto, and hence no one had any interest to defend this suit but the defendant, and he was therefore the only proper party defendant."[4] Fox v. Moyer was relied upon by the plaintiff's counsel in Miller v. Hall[5] as controlling, but the Court of Appeals said that the former case was not a creditors' bill, and was plainly to be distinguished from the other cases which we have noticed. In Buffington v. Harvey[6] it was urged that the assignee's bill was defective because the bankrupt was not joined. Bradley, J., after remarking that the bankrupt had no interest to be affected except what was represented by the assignee, said: "As to

[1] Adler v. Milwaukee Patent Brick Mfg. Co., 13 Wis. 57; Vick v. Lane, 56 Miss. 681; Wetherbee v. Baker, 35 N. J. Eq. 501; Holmes v. Sherwood, 3 McCra. 405; Bronson v. Wilmington, N. C., Life Ins. Co., 85 N. C. 411.

[2] Wetherbee v. Baker, 35 N. J. Eq. 501; Perkins v. Sanders, 56 Miss. 733; Patterson v. Lynde, 112 Ill. 196; Taylor on Corps., § 704.

[3] 54 N. Y. 130. See Leonard v. Green, 34 Minn. 140.

[4] See Campbell v. Jones, 25 Minn. 155.

[5] 40 N. Y. Supr. Ct. 268, affi'd 70 N. Y. 252.

[6] 95 U. S. 103.

the bankrupt himself the conveyance was good; if set aside it could only benefit his creditors. He could not gain or lose, whichever way it might be decided."[1] In Potter v. Phillips[2] the court said that though the debtor was a proper party, it did not see why he was to be regarded as a necessary party; whether the conveyances were fraudulent or in good faith the property irrevocably passed beyond his control. He could be prejudiced in no way, in a legal sense, by a determination which subjected the property to the payment of his debts. So it was decided in Minnesota, that where a creditor sold land which the debtor had fraudulently alienated, the fraudulent grantee might bring an action against the purchaser to determine his title without bringing in the fraudulent grantor.[3] It is remarked in some of the cases that the fraudulent grantor should be joined because it is his conduct that is to be investigated. The Supreme Court of Mississippi observe, however, that the object of the proceeding is to reach property, not character. In truth the proceeding is *in rem*, and while the complainant may, if he chooses so to do, join as defendants all who are connected with the property, or the transactions to be investigated, he is only compelled to join those in whom the legal title vests, or those who have a beneficial interest to be affected.[4] Cases are cited in consonance with this reasoning.[5]

What inference then is to be deduced from this mass of authority, and which class of cases embodies the best logic? Should the debtor be joined as a defendant in an action to annul a fraudulent transfer? The best reasoning of the authorities seems to establish the rule that the debtor's

[1] Benton v. Allen, 2 Fed. Rep. 448; Weise v. Wardle, L. R. 19 Eq. 171.

[2] 44 Iowa 357.

[3] Campbell v. Jones, 25 Minn. 155.

[4] Taylor v. Webb, 54 Miss. 36.

[5] Smith v. Grim, 26 Pa. St. 95; Dockray v. Mason, 48 Me. 178; Merry v. Fremon, 44 Mo. 518; Cornell v. Radway, 22 Wis. 260. See Shaw v. Millsaps, 50 Miss. 380; Jackman v. Robinson, 64 Mo. 289.

presence as a defendant is superfluous in suits brought against fraudulent alienees to annul specific covinous conveyances. The transfer is conclusive upon him, and hence his joinder cannot aid the creditor, or benefit the debtor; the suit is a proceeding *in rem* to clear the title to the property only so far as the creditor's needs may require; under established principles of law the debtor can gain nothing by it; he is practically a stranger to the property, nor can he be prejudiced by a decree which applies the property to the payment of a fixed judgment-debt. On the other hand, where the suit prosecuted is purely a creditors' bill embodying the elements of a bill of discovery, the debtor's presence would seem to be essential to the jurisdiction of the court. The practitioner must be careful to distinguish between an action instituted to reach specific property fraudulently alienated, and a suit brought to discover equitable interests which are not subject to execution, and the title to which is in the debtor. In the latter case the debtor must of necessity be a defendant. Especially should the complainant make the debtor a defendant where it appears that parties holding separate property under distinct conveyances are joined. In such proceedings the debtor constitutes the king-pin of the action. In any case it is the safer and more prudent practice to summon the debtor as a defendant, for a vexed question is then put at rest, and the misfortune similar to that which overwhelmed the creditors' representative in Miller v. Hall[1] will be averted.[2]

§ 130. **Defendants need not be equally guilty.**—As a general rule where the subject-matter of a suit is real or per-

[1] 70 N. Y. 252.

[2] When the sole design of a bill is to have individual property of one partner, claimed to have been fraudulently alienated, applied in payment of a firm judgment, another partner against whom no fraud or concealment is imputed, no discovery sought, and no ruling asked, is neither a necessary nor a proper party. Randolph v. Daly, 16 N. J. Eq. 315.

sonal property, and the purpose of the plaintiff is to set aside fraudulent judicial proceedings in reference to it, the complainant should make all persons parties who were actors in the proceedings, especially if they claim a present interest in the property in dispute. A complaint so framed is not demurrable on the theory that there is an improper joinder of several causes of action against different persons; on the contrary it is regarded as a single cause of action affecting all the defendants. Westcott, J., in delivering the opinion of the Supreme Court of Florida,[1] very appropriately says: "It is apparent from the case stated that all of the defendants were not jointly and equally concerned in each distinct fraudulent act charged. There was a series of acts in this well-conceived network of fraud, all terminating in the deception and injury of the plaintiff. The defendants performed different parts in the drama. These acts affected the property of the debtor—some the personal property, others the real estate. The object of the plaintiff in this complaint is to get the assistance of this court in unravelling this network of fraud in respect to each species of property, and to have a due application of the same to the payment of the claims of creditors. The right of the plaintiff is against the whole property, and his right against all portions of it is of the same nature. The decree in chancery and the sale thereunder are but acts of fraud, which are sought to be set aside in order to enforce this general right. In fact the right to set aside these proceedings can only coexist with an equity affecting the property which was the subject of them. There can be no such thing as an equity or right to set aside these proceedings distinct and independent of rights and equities attached to the subject-matter that they affect. The result is that these are not several causes of action, but are acts which, connected with the debt due plaintiff, constitute a ground for one action alone."

[1] Howse v. Moody, 14 Fla. 63.

§ 131. **Fraudulent assignee or grantee must be joined.**—A judgment as a general rule only binds parties and privies. As the property which is the object of pursuit is usually in the hands of a transferee, it follows that such person must be joined as defendant, so that he may be affected and concluded by the judgment. The proceeding would be futile if it omitted him.[1] It was accordingly held, in a case where a creditors' bill was filed to reach moneys due upon a mortgage which was alleged to have been fraudulently assigned by the debtor, that the assignee of the mortgage, although he resided out of the State, must be joined as a defendant.[2] Parties to intermediate conveyances need not be joined,[3] nor grantees *pendente lite*, for they stand in no better position than those under whom they claim.[4]

In a suit to set aside a fraudulent conveyance there is no necessary inconsistency in averring the grantee to be a fictitious person, and stating that the deed in his name was made to hinder and defraud creditors.[5]

§ 132. **Joining defendants.**—The rules with reference to the joinder of defendants will be noticed somewhat at length in discussing the subject of complaints bad for multifariousness.[6] The cases there reviewed seem to establish the principle that different fraudulent purchasers of distinct pieces of property may be joined as defendants. In such cases the debtor is a necessary party, as he is "the very link which unites them all together, the common centre to which they are all connected, and it is because he is a party

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[1] Sage v. Mosher, 28 Barb. (N. Y.) 287.

[2] Gray v. Schenck, 4 N. Y. 460. See also Tichenor v. Allen, 13 Gratt. (Va.) 15; Jackman v. Robinson, 64 Mo. 289; Hammond v. Hudson River I. & M. Co., 20 Barb. (N. Y.) 379; Copis v. Middleton, 2 Madd. 410; Thornberry v. Baxter, 24 Ark. 76; Winslow v. Dousman, 18 Wis. 456; Hamlin v. Wright, 23 Wis. 491.

[3] Stout v. Stout, 77 Ind. 537; Walter v. Riehl, 38 Md. 211; Jackman v. Robinson, 64 Mo. 289.

[4] Schaferman v. O'Brien, 28 Md. 565.

[5] Purkitt v. Polack, 17 Cal. 327.

[6] See §§ 150, 151, 152.

defendant that they can all be joined in one action as co-defendants."[1] The defendants in such cases are said to be united in a common design. Each is charged with colluding with the debtor in order to defraud his creditors. Where there is one entire case stated, as against the debtor, it is no objection that one or more of the defendants to whom parts of the property have been fraudulently conveyed had nothing to do with the other fraudulent transactions. The case against the debtor is so entire that it cannot be prosecuted in several suits, and yet each of the defendants is a necessary party to some part of the case stated.[2] If, however, the party reached and made defendant has a remedy over against other parties for contribution or indemnity, it will be no defense to the primary suit against him that such persons are not made parties. A creditor might never get his money if he could be stayed until all the parties who were obligated could be made to contribute their proportionate shares of the liability.[3]

§ 132*a*. **Conveyance pending suit.**—The law is established that a party who intermeddles with property in litigation does so at his peril, and is as conclusively bound by the results of the litigation, whatever they may be, as if he had

[1] Pomeroy's Remedies and Remedial Rights, § 347; Lawrence v. Bank of the Republic, 35 N. Y. 324; Trego v. Skinner, 42 Md. 432; Haines v. Hollister, 64 N. Y. 1; Vanderpoel v. Van Valkenburgh, 6 N. Y. 190; Waller v. Shannon, 53 Miss. 500; Bauknight v. Sloan, 17 Fla. 284; Donovan v. Dunning, 69 Mo. 436; Van Kleeck v. Miller, 19 N. B. R. 484; Bank v. Harris, 84 N. C. 206; Royer Wheel Co. v. Fielding, 61 How. Pr. (N. Y.) 437. See § 150. Chase v. Searles, 45 N. H. 511; Allison v. Weller, 6 T. & C. (N. Y.) 291; Boone County v. Keck, 31 Ark. 387.

[2] Way v. Bragaw, 16 N. J. Eq. 216. Compare Atty.-Genl. v. Corporation of Poole, 4 Mylne & Cr. 31; Brinkerhoff v. Brown, 4 Johns. Ch. (N. Y.) 671; Fellows v. Fellows, 4 Cow. (N. Y.) 682; Boyd v. Hoyt, 5 Paige (N. Y.) 78; Turner v. Robinson, 1 Sim. & S. 313; Marx v. Tailer, 12 N. Y. Civ. Pro. 226.

[3] Marsh v. Burroughs, 1 Woods 468. Where an action is brought to forfeit a charter a lessee of the corporation may be let in to defend. People v. Albany & Vt. R.R. Co., 77 N. Y. 232. The husband of the transferee is not a proper defendant in an action to set aside the transfer. Lore v. Dierkes, 19 J. & S. (N. Y.) 144. As to when a

been a party to it from the outset.[1] Were the rule otherwise endless entanglements would result.[2]

§ 133. **Assignee and receiver as defendant.**—In a case which arose in New York, in which the assignee of an insolvent copartnership had been joined as defendant, the Court of Appeals said: "As this is an equity action, the assignee of the firm, who had received its assets and never rendered any account for the same, was a proper party. He represents the firm, stands in its place so far as property is concerned, and the avails of the same in his hands are first liable to be appropriated to pay the demands of the plaintiffs. No valid reason exists why a person thus situated is not a proper party, in connection with the survivors of the copartnership and the representative of the deceased partner."[3] If an action is brought by a judgment-creditor to reach property fraudulently alienated, the fact that the debtor has made a general assignment for the benefit of creditors is no defense to the debtor or to his fraudulent alienee, because they can have no interest whatever in the fund, and are not vested with the right to guard any interests the assignee may possibly have; it is the assignee's exclusive privilege to personally assert such rights.[4] Furthermore, under some circumstances, the creditor may maintain an action in his own name to set aside a fraudulent conveyance, even though the assignee has the same right, if it can be shown that the assignee is in collusion with the fraudulent parties, or has refused on proper request to become a plaintiff.[5] In any case the defense of the non-joinder of the assignee, to be available, should be

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cause of action to set aside a mortgage on the ground of usury and a cause of action to annul a fraudulent conveyance cannot be joined, see Marx v. Tailer, 12 N. Y. Civ. Pro. 226.

[1] Tilton v. Cofield, 93 U. S. 168; Inloes' Lessee v. Harvey, 11 Md. 524; Salisbury v. Morss, 7 Lans. (N. Y.) 359, affi'd 55 N. Y. 675.

[2] See § 157.

[3] Haines v. Hollister, 64 N. Y. 3.

[4] Fort Stanwix Bank v. Leggett, 51 N. Y. 554.

[5] Bate v. Graham, 11 N. Y. 237. See § 114.

taken by demurrer or answer,[1] disclosing the names of the omitted parties,[2] or it will be considered waived.[3]

§ 134. Objection as to non-joinder—How raised.—Durand v. Hankerson[4] is perhaps an extreme illustration of this latter proposition. That action was prosecuted by a creditor to cancel a deed. The conveyance was held to be good, but it appeared that the debtor had taken back a mortgage upon the property, which remained unsatisfied, and the evidence tended to show that the debtor had assigned the mortgage to a person not a party to the suit. It was proved and found that this assignment was fraudulent, and the purchaser from the debtor was directed to pay the mortgage to a receiver. The purchaser strenuously resisted this decree, upon the ground that the pretended assignee of the mortgage not being a party, was not bound by the judgment, but the learned Woodruff, J., held that while it presented a case of possible hardship, as payment might perhaps be enforced a second time, yet the purchaser should have protected himself by raising the objection in the manner prescribed by law. The defendant, who neither by answer nor demurrer takes such an objection, waives it, and therefore cannot afterward be heard to object on that ground to any decree to which, upon the facts alleged and proved, the plaintiff may be entitled. The cause thereafter proceeds, as to him, with the like right in the plaintiff to a decree as if the supposed proper or necessary party had been brought into court.

We may here observe that the appointment of a receiver does not absolutely dissolve a national bank, and that in an action to establish the rejected claim of a creditor, the bank and the receiver may both be made parties defendant.[5]

[1] Fort Stanwix Bank v. Leggett, 51 N. Y. 554.

[2] Bay State Iron Co. v. Goodall, 39 N. H. 234.

[3] Annin v. Annin, 24 N. J. Eq. 184; Lyman v. Place, 26 N. J. Eq. 30.

[4] 39 N. Y. 287.

[5] Green v. Walkill Nat. Bank, 7 Hun

§ 135. **Misjoinder of causes of action.**—A cause of action against sureties upon the bond of an administrator, claiming a breach of its condition, cannot be united in the same complaint with a cause of action arising out of the fraudulent disposition of property,[1] against the administrator of the deceased intestate and others.

§ 136. **Executors, administrators, heirs, and legatees.**—We have already considered the status of personal representatives,[2] heirs, and legatees,[3] as complainants. Let us briefly advert to the question of their joinder as defendants. In Allen v. Vestal,[4] it was said that a creditor, in an action to set aside a fraudulent conveyance to heirs of a deceased debtor, should allege that the personal property had been first exhausted, and should make the administrator a party; or, if there was none, should secure one to be appointed.[5] This is but another phase of the general question as to the necessity of joining the debtor as a defendant. Authorities can be cited to the effect that the administrator is not a necessary party to the creditors' proceedings,[6] and to the opposite effect,[7] and holding that heirs need not be joined,[8] and, in New York, as is elsewhere

(N. Y.) 64; Turner v. First Nat. Bank, 26 Iowa 562. Compare Pahquioque Bank v. Bethel Bank, 36 Conn. 325; Kennedy v. Gibson, 8 Wall. 498.

[1] Howse v. Moody, 14 Fla. 59. Compare, generally, N. Y. & N. H. R.R. Co. v. Schuyler, 17 N. Y. 607; Town of Venice v. Woodruff, 62 N. Y. 470.

[2] See §§ 112, 113.

[3] See § 121.

[4] 60 Ind. 245.

[5] Boggs v. McCoy, 15 W. Va. 344. *Contra*, Jackman v. Robinson, 64 Mo. 289. Compare Smith v. Grim, 26 Pa. St. 95.

[6] Dockray v. Mason, 48 Me. 178; Merry v. Fremon, 44 Mo. 518; Taylor v. Webb, 54 Miss. 36; Cornell v. Radway, 22 Wis. 260; Zoll v. Soper, 75 Mo. 462; Jackman v. Robinson, 64 Mo. 289. See Coffey v. Norwood, 81 Ala. 516; Munn v. Marsh, 38 N. J. Eq. 410.

[7] Alexander v. Quigley, 2 Duv. (Ky.) 400; Postlewait v. Howes, 3 Iowa 366; Coates v. Day, 9 Mo. 300; Boggs v. McCoy, 15 W. Va. 344; Pharis v. Leachman, 20 Ala. 662. See Bachman v. Sepulveda, 39 Cal. 688.

[8] Smith v. Grim, 26 Pa. St. 96; Wall v. Fairley, 73 N. C. 464; Shaw v. Millsaps, 50 Miss. 384. Compare Simmons v. Ingram, 60 Miss. 886. The conveyance made by their ancestor, it is said, though fraudulent, concludes them, and effectually cuts off all their interest in the property. Harlin v. Stevenson, 30 Iowa 371. It may

shown,[1] a distinction is made as to the form of the action, the debtor being a necessary party in a creditors' action,[2] but not in a suit in equity to remove a fraudulent cloud.[3] Where this distinction is recognized, it might be extended to cover the cases of personal representatives and heirs. The United States Supreme Court leans to the view that, in a suit to charge real estate with the payment of a debt, the heirs and devisees should be made parties to the bill.[4]

In a creditors' bill under which an executor had been removed from office, the Supreme Court of South Carolina held that the legatees were necessary parties, and that the receiver appointed in the place of the deposed executor did not represent them.[5] Again the Supreme Court of Ohio has decided, that where the grantee dies after the

here be observed that the power of a court of equity to charge real estate in the hands of heirs with the payment of the ancestor's debts is undoubted. Chewett v. Moran, 17 Fed. Rep. 820; Payson v. Hadduck, 8 Biss. 293; Riddle v. Mandeville, 5 Cranch 322; Stratford v. Ritson, 10 Beav. 25; Ponsford v. Hartley, 2 Johns. & H. 736; Adams' Eq. 257; Story's Eq. Plead. 99–102. By statute in New York heirs of an intestate who have inherited land must, in certain cases, be sued jointly, and not separately, for a debt due from the deceased. Kellogg v. Olmsted, 6 How. Pr. (N. Y.) 487. See Selover v. Coe, 63 N. Y. 438.

[1] See §§ 128, 129.

[2] Miller v. Hall, 70 N. Y. 252.

[3] Fox v. Moyer, 54 N. Y. 130.

[4] Walker v. Powers, 104 U. S. 251.

Administrator not necessary party —Cornell v. *Radway.*—In an action which arose in Wisconsin, it appeared that a debtor in his lifetime received an absolute deed of land and failed to record it, and subsequently destroyed the deed with a fraudulent design, and procured the grantor to execute another deed to a third person without consideration. A judgment-creditor of the deceased debtor, whose judgment was recovered while the deceased held the first deed, brought a suit against the third party, and the widow and heirs of the deceased debtor, to establish the debtor's title and enforce the lien of the judgment. Objection was raised that the administrator was not a party. The court said: "This is well answered when it is said that this is a proceeding for the benefit of the estate, and that the administrator could make no opposition if he were present. We do not see, therefore, how the estate can be prejudiced or the plaintiff's right to relief affected by the absence of the administrator. The conveyance to the defendant Jones [the third party] being set aside, and the title adjudged to have been in the deceased judgment-debtor from the time of his purchase, the plaintiff will then proceed as if the debtor had died seized of the land with full evidence of title in himself. The administrator is not a necessary party." Cornell v. Radway, 22 Wis. 265.

[5] Fraser v. Charleston, 13 S. C. 533.

rendering of a decree in favor of a judgment-creditor setting aside a conveyance and ordering a sale of the property, the failure to revive the decree against the heirs of the grantee did not affect the title of a purchaser under the decree.[1]

What then is the result of the cases upon this point? Necessarily much the same conclusion must be reached as is gathered from the authorities upon the question of the joinder of the debtor in an action to reach assets in the hands of a third party. We have already seen that the personal representatives may, in certain cases, annul covinous alienations made by the deceased, but only so far as may be necessary to satisfy creditors.[2] In States where the right of the creditor to seek direct relief is upheld, it is difficult to see why the personal representatives or heirs should be joined; the conveyance is conclusive upon such parties, and their presence in the suit will neither aid the creditors nor benefit them.

§ 137. **Trustee and cestui que trust.**—Mr. Pomeroy says:[3] "There is a broad distinction between the case of an action brought in opposition to the trust, to set aside the deed or other instrument by which it was created, and to procure it to be declared a nullity, and that of an action brought in furtherance of the trust, to enforce its provisions, to establish it as valid, or to procure it to be wound up and settled. In the first case, the suit may be maintained without the presence of the beneficiaries, since the trustees represent them all and defend for them." The Supreme Court of Georgia,[4] adopting this general rule, held that where a creditor claims not under but in opposition to a deed of trust made by his debtor, and seeks to set the same aside on the ground that it is, as to him,

[1] Beaumont v. Herrick, 24 Ohio St. 446.

[2] See §§ 128, 129.

[3] Remedies and Remedial Rights, § 357.

[4] Tucker v. Zimmerman, 61 Ga. 599.

fraudulent and void, he is at liberty to proceed against the fraudulent trustee who is the holder of the legal estate in the property, without joining the *cestui que trust*.[1] A decree setting aside the deed, or charging the property with the creditor's demand, will, if fairly and honestly obtained, conclude the *cestui que trust* as being represented by the trustee, but is subject to be impeached for fraud or collusion.[2]

§ 138. **Party having lien.**—It certainly is reasonable, and seems to be recognized as an established rule, that where a party has a lien, by way of mortgage for example, upon the property which is the subject of contention, and no ruling is asked against such lien, and it is not assailed, but the title under it is conceded to be valid, there is no ground upon which the holder of the lien can be regarded as a necessary party to the suit.[3] The creditors, having elected to avoid the fraudulent conveyance, take the property as though the transfer had never been made, and subject to all lawful liens upon it.[4] But where the lien holder is made a party to the suit, and the validity of his claim is investigated and disposed of by the judgment adversely to the validity of the lien, a sale by the receiver will transfer to the grantee a title superior to such lien or claim.[5]

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[1] Rogers v. Rogers, 3 Paige (N. Y.) 379.

[2] Russell v. Lasher, 4 Barb. (N. Y.) 232; Wheeler v. Wheedon, 9 How. Pr. (N. Y.) 300.

[3] Trego v. Skinner, 42 Md. 431. See Walter v. Riehl, 38 Md. 211; Venable v. Bank of the United States, 2 Pet. 107; Erfort v. Consalus, 47 Mo. 213. Compare Reynolds v. Park, 5 Lans. (N. Y.) 149; reversed, 53 N. Y. 36.

[4] Hutchinson v. Murchie, 74 Me. 190; Avery v. Hackley, 20 Wall. 411. Compare Murphy v. Briggs, 89 N. Y. 446.

[5] Shand v. Hanley, 71 N. Y. 324. See Chautauque Co. Bank v. Risley, 19 N. Y. 372. Where a debtor has conveyed property in fraud of creditors, and the alienee at the debtor's request has given a mortgage upon it to a creditor whose debt existed at the date of the conveyance, the latter is regarded as a purchaser "for a valuable consideration," 2 R. S. N. Y. 137, § 5; and although the conveyance is set aside by other creditors, the lien of the mortgage cannot be affected. Murphy v. Briggs, 89 N. Y. 446, distinguishing and limiting Wood v. Robinson, 22 N. Y. 564.

§ 139. Stockholders.—The assets of a corporation are, as we have seen,[1] regarded as a trust fund for the payment of its debts, and its creditors have a lien upon it, and the right to priority of payment over its stockholders.[2] Hence where property of a corporation had been divided among its stockholders before its debts had been paid, the court decided that a judgment-creditor, with execution returned unsatisfied, could maintain an action in the nature of a creditors' bill against any one stockholder to reach whatever had been received by him, whether wrongfully or otherwise. It is unnecessary to make all the stockholders defendants.[3]

The question of the statutory liability of stockholders to the creditors of a corporation where the capital has not been all paid in and a certificate to that effect filed as required by statute, has given rise to much litigation in New York and other States where such provisions exist. This liability is said to rest in contract.[4] The statute in effect withdraws the protection of the corporation from the stockholders, and holds them liable as copartners.[5] If the liability was penal the statute could of course have no operation in another State,[6] for penal statutes are strictly local in their operations and results.[7] Hence it was held that, as the obligation imposed upon a stockholder under the New York statute rested in contract, it could be enforced in Florida,[8]

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[1] See §§ 117–119; Wait on Insolvent Corps., Chap. VII.

[2] Bartlett v. Drew, 57 N. Y. 587; Upton v. Tribilcock, 91 U. S. 45–47; Sawyer v. Hoag, 17 Wall. 610.

[3] Bartlett v. Drew, 57 N. Y. 587. A stockholder of an insolvent bank may be compelled to pay an unpaid subscription to the assignee, and he has no right to set off the amount of his deposit in the bank. Macungie Savings Bank v. Bastian, 1 Am. Insolv. Rep. 484.

[4] Flash v. Conn, 109 U. S. 371; Wiles v. Suydam, 64 N. Y. 173.

[5] Corning v. McCullough, 1 N. Y. 47.

[6] Flash v. Conn, 109 U. S. 376.

[7] See The Antelope, 10 Wheat. 66; Scoville v. Canfield, 14 Johns. (N. Y.) 338; Western Transp. Co. v. Kilderhouse, 87 N. Y. 430; Lemmon v. People, 20 N. Y. 562; Henry v. Sargeant, 13 N. H. 321; Story's Conflict of Laws (8th ed.), § 621.

[8] Flash v. Conn, 109 U. S. 379.

the rule being that a transitory action may be brought in any court having jurisdiction of the parties and the subject-matter.[1]

[1] Dennick v. Railroad Co., 103 U. S. 11. We cannot here venture, except incidentally, into the wide field regulating the remedies of creditors against insolvent corporations or their officers. See Wait on Insolv. Corps., Chap. II. But it may be noted that a creditors' bill may be filed against a county. Lyell v. Supervisors of St. Clair, 3 McL. 580; Wait on Insolv. Corps. § 111.

CHAPTER IX.

COMPLAINT.

§ 140. Recitals of the complaint.
141. Pleading fraud.
142. Evidence not to be pleaded.
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154. Attacking different conveyances.
155. Prayer of complaint—Variance—Verification.
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157. Description—*Lis pendens*.
157*a*. Change of venue—Territorial jurisdiction.

§ 140. **Recitals of the complaint.**—To successfully impeach a fraudulent conveyance, it ordinarily devolves upon the complainants to aver in the pleading that they were creditors at the time of the alienation in controversy,[1] and to state against whom the judgment proceeded upon was recovered.[2] The complaint will ordinarily be considered defective unless it appears upon its face that an indebtedness exists,[3] and that the plaintiff has exhausted his remedy at law;[4] and such averments cannot usually be supplied by

[1] Merrell v. Johnson, 96 Ill. 230; Uhre v. Melum, 17 Bradw. (Ill.) 182; Donley v. McKiernan, 62 Ala. 34; Walthall v. Rives, 34 Ala. 91. Compare Newman v. Van Duyne, 42 N. J. Eq. 485.

[2] Lipperd v. Edwards, 39 Ind. 169. See Chap. IV. A bill in chancery is not good as an attempt to set aside a fraudulent conveyance, procured by a debtor to be made to his daughter, if it neither alleges that there is a judgment against the father, nor that the debt due at the time the conveyance was made is still due, and fails to pray for such relief. Ferguson v. Bobo, 54 Miss. 121.

[3] Elwell v. Johnson, 3 Hun (N. Y.) 558; s. c. 74 N. Y. 80.

[4] Beardsley Scythe Co. v. Foster, 36 N. Y. 565. See Allyn v. Thurston, 53 N. Y. 622; Suydam v. Northwestern Ins. Co., 51 Pa. St. 394; Scott v. McFarland, 34 Miss. 363; Cassidy v. Meacham, 3 Paige (N. Y.) 311. See Chap. IV.

an allegation of a total want of property,[1] or the uselessness of an execution,[2] and, if it does not appear that the execution was issued to the county of the debtor's residence, or other proper county, the complaint is not aided by an averment that it was returned unsatisfied.[3] According to some of the cases it is not sufficient to entitle the creditor to the aid of a court of equity merely to show that the debtor made a fraudulent disposition of a portion of his property. The complainant must set forth that the alienation of property complained of embarrassed him in obtaining satisfaction of his debt, "for if the debtor has other property subject to the judgment and execution sufficient to satisfy the debt, there is no necessity for the creditor to resort to equity."[4] The bill should recite facts sufficient to indicate that the judgment cannot be collected without equitable aid.[5] This averment is material, and a decree upon proofs without this necessary allegation is said to be erroneous, since "the defendant cannot be required to meet and overcome evidence not responsive to the pleadings."[6] It may be here observed concerning the rules of pleading, that, generally speaking, it is the right of an antagonistic defendant to have all the material facts on

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[1] See McElwain v. Willis, 9 Wend. (N. Y.) 548; Crippen v. Hudson, 13 N. Y. 165; Beardsley Scythe Co. v. Foster, 36 N. Y. 565.

[2] Adsit v. Sanford, 23 Hun (N. Y.) 45.

[3] Payne v. Sheldon, 63 Barb. (N. Y.) 176.

[4] Dunham v. Cox, 10 N. J. Eq. 467.

[5] Emery v. Yount, 1 West Coast Rep. 499; S. C. 7 Col. 109. In an action to set aside a conveyance of land upon the ground of fraud the complaint should aver the delivery of the deed claimed to be fraudulent. Doerfler v. Schmidt, 64 Cal. 265.

[6] Thomas v. Mackey, 3 Col. 393. In Randolph v. Daly, 16 N. J. Eq. 317, the court said: "It is not necessary to aver that the firm is insolvent in order to entitle the complainants to relief. The partnership property may be amply sufficient to satisfy all the debts of the firm, yet it may be so covered up, or placed beyond the reach of process, as not to be amenable to execution at law, and to render the interference of equity essential to the ends of justice. All that can be required is, that it should appear by the bill that the complainant has exhausted his remedy at law, and that the aid of this court is necessary to enable him to obtain satisfaction of his judgment."

which relief is sought specifically set forth in the bill, to the end that such facts may be admitted or controverted by the answer and testimony; and usually no proofs will be admitted unless *secundum allegata.*[1] Hence, where it is the purpose of the complainants to seek relief for creditors other than themselves, such intention should be manifested by suitable averments in the bill.

§ 141. **Pleading fraud.**—Fraud has been said in a general way to be a conclusion of law, though perhaps, more correctly speaking, it is the judgment of law upon facts and intents.[2] A mere general averment that a deed was fraudulent, or that it was made with the intent to hinder, delay, or defraud creditors, has been regarded as an insufficient method of pleading. Peckham, J., has said: "Mere general allegations of fraud or conspiracy are of no value as stating a cause of action."[3] There must, ordinarily, be averments of the facts which constitute the fraud, or which tend to support the conclusion.[4] Relief will not be afforded upon the ground of fraud unless it be made a distinct allegation in the bill, so that it may be put in issue by the pleadings.[5] In Flewellen v. Crane,[6] the averments were that a conveyance, purporting on its face to be made in payment of a debt due from the grantor to the grantee, was "fraudulent and void as against pre-existing creditors," and that it was "made with the intent to hinder, delay, or defraud said creditors."[7] There was no averment impeach-

[1] Burt v. Keyes, 1 Flipp. 72. Uncertainty in a pleading should be reached by motion. Moorman v. Shockney, 95 Ind. 88.

[2] See § 13.

[3] Wood v. Amory, 105 N. Y. 282; citing Van Weel v. Winston, 115 U. S. 228; Cohn v. Goldman, 76 N. Y. 284; Knapp v. City of Brooklyn, 97 N. Y. 520.

[4] Pickett v. Pipkin, 64 Ala. 523; Flewellen v. Crane, 58 Ala. 627; Gilbert v. Lewis, 1 De G., J. & S. 49; Myers v. Sheriff, 21 La. Ann. 172; Rhead v. Hounson, 46 Mich. 246; Jones v. Massey, 79 Ala. 370.

[5] Patton v. Taylor, 7 How. 159; Noonan v. Lee, 2 Black 508; Voorhees v. Bonesteel, 16 Wall. 29; Beaubien v. Beaubien, 23 How. 190.

[6] 58 Ala. 627.

[7] See Rowland v. Coleman, 45 Ga. 204; Meeker v. Harris, 19 Cal. 278.

ing the adequacy or *bona fides* of the consideration expressed; nor asserting that the debt was not justly due from the grantor to the grantee; no setting up a secret trust for the grantor. The pleading was declared insufficient to support a final decree, rendered upon a decree *pro confesso*, which adjudged the conveyance void for fraud. The rule is that the facts upon which the fraud is predicated cannot be left to inference, but must be distinctly and specifically averred.[1] If a bill is filed to set aside a deed upon the ground of undue influence, it is not necessary to allege every fact showing the actual exercise of undue influence, but the relations of the parties ought to be stated, and the general fact of undue influence alleged, and some specific instances given from which the court could infer it.[2] The common-law rule was clearly settled that fraud must be distinctly alleged and as distinctly proved, and that it was not allowable to leave fraud to be inferred wholly from the facts. While it may not be absolutely essential to employ the word "fraud" in the pleading, yet the facts stated should show distinctly that fraud is charged.[3] The New York Court of Appeals say that the use of the word "fraud" or "fraudulent," in order to characterize the transaction, or specify the ground of relief, is not absolutely necessary.[4] Where the circumstances are such as do not warrant the court in avoiding the transaction *in toto*, it may be avoided as an absolute conveyance, and permitted to stand as a security;[5] but such relief cannot be afforded unless the complaint contains allegations adapted

[1] Thomas v. Mackey, 3 Col. 393; Small v. Boudinot, 9 N. J. Eq. 391; Klein v. Horine, 47 Ill. 430; Bryan v. Spruill, 4 Jones' Eq. (N. C.) 27; Ontario Bank v. Root, 3 Paige (N. Y.) 478.

[2] 1 Drewry's Eq. Pl. 15.

[3] See Davy v. Garrett, 7 Ch. D. 489; Smith v. Kay, 7 H. L. Cas. 763.

[4] Whittlesey v. Delaney, 73 N. Y. 575; Warner v. Blakeman, 4 Abb. Ct. App. Dec. (N. Y.) 530; Maher v. Hibernia Ins. Co., 67 N. Y. 283. See Hamlen v. McGillicuddy, 62 Me. 268.

[5] Bigelow v. Ayrault, 46 Barb. (N. Y.) 143; May on Fraudulent Conveyances, p. 235. See § 51.

thereto.[1] An averment of an intent to defraud is one of fact, and not a statement of a conclusion of law.[2] It must be alleged as well as proved,[3] and it may be directly testified to as a fact.[4]

§ 142. **Evidence not to be pleaded.**—General certainty is sufficient in pleading in equity; and though a mere general charge of fraud is insufficient, it is not to be understood that the particular facts and circumstances which confirm or establish it should be minutely charged.[5] It is not necessary, or proper, that pleadings at law or in equity should be incumbered with all the matters of evidence the complainant may intend to introduce.[6] A general averment of facts—not of conclusions of law—upon which the rights of the parties depend, is sufficient. By the elementary rules of pleading facts may be pleaded according to their legal effect, without setting forth the particulars that lead to it; and necessary circumstances implied by law need not be expressed in the plea.[7] So much of the complaint, however, as sets out in detail the inceptive steps which culminated in the alleged fraudulent conveyance, is not irrelevant or redundant matter.[8]

§ 143. **Alleging insolvency.**—As elsewhere shown, a voluntary conveyance is not generally regarded as fraudulent *per*

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[1] Van Wyck v. Baker, 16 Hun (N. Y.) 171.

[2] Platt v. Mead, 9 Fed. Rep. 91.

[3] Genesee River Nat. Bank v. Mead, 18 Hun (N. Y.) 303.

[4] Clarke v. Roch. & S. R.R. Co., 14 N. Y. 570. "The complaint contains a distinct charge that the assignment was made to hinder, delay, and defraud the creditors of the assignor, and that it is therefore fraudulent and void. This is unexceptionable and sufficient pleading, *where the vice of the instrument is inherent in its terms.* When an assignment contains provisions which necessarily tend to hinder, delay, and defraud creditors, these provisions are conclusive evidence of the design of the parties to the instrument. . . . . It is not necessary in pleading to point out the particular features or clauses of the instrument which are objected to." Jessup v. Hulse, 29 Barb. (N. Y.) 541; reversed, 21 N. Y. 168, on another point.

[5] Story's Eq. Pl. § 252.

[6] Zimmerman v. Willard, 114 Ill. 370.

[7] Sullivan v. Iron & Silver Mining Co., 109 U. S. 555.

[8] Perkins v. Center, 35 Cal. 714.

se.[1] If a debtor is perfectly solvent, he can do what he will with his property so long as he does not dispose of so much of it as to disable him from paying his debts. This is a rule of pleading as well as of evidence. Hence a bill which contained no allegation that the debtor at the time of the alienation was insolvent or embarrassed, was held bad,[2] for it is only when an inadequate amount of property remains that creditors have the legal right to complain.[3] The court said that, for aught that appeared in the pleading, the debtor might have been possessed of ample means, other than the property in controversy, to pay his debts; and in such a case the conveyance is not ordinarily open to the attack of creditors.

A man is said to be insolvent "when he is not in a condition to pay his debts in the ordinary course, as persons carrying on trade usually do,"[4] or when all his obligations could not be collected by legal process out of his own means.[5] A complaint which states that "the said W. L. J., at the time of making said deed, did not have sufficient property remaining, subject to execution, to pay all his said debts, but by means of said conveyance rendered himself wholly insolvent, and has not now nor has, at any time since said conveyance, had sufficient property, subject to execution, out of which said debts could be made," is sufficient.[6]

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[1] Young v. Heermans, 66 N. Y. 374; Holden v. Burnham, 63 N. Y. 75; Thomas v. Mackey, 3 Col. 390. See § 208.

[2] Burdsall v. Waggoner, 4 Col. 261. See Merrell v. Johnson, 96 Ill. 230; McCole v. Loehr, 79 Ind. 431; Spaulding v. Blythe, 73 Ind. 93; Noble v. Hines, 72 Ind. 12; Sherman v. Hogland, 54 Ind. 578, 584; King's Heirs v. Thompson, 9 Pet. 204; Warner v. Dove, 33 Md. 579.

[3] Lee v. Lee, 77 Ind. 253. See Platt v. Mead, 9 Fed. Rep. 91; Noble v. Hines, 72 Ind. 12; Whitesel v. Hiney, 62 Ind. 168.

[4] Shone v. Lucas, 3 Dowl. & Ry. 218.

[5] Herrick v. Borst, 4 Hill (N. Y.) 652; Potter v. McDowell, 31 Mo. 73.

[6] Jennings v. Howard, 80 Ind. 216. See Price v. Sanders, 60 Ind. 310. It is said by Danforth, J., in an important case before the New York Court of Appeals, Van Dyck v. McQuade, 86 N. Y. 44: "An individual may purchase property, contract debts, incur new liabilities, and keep on in business, al-

§ 144. **Allegations concerning consideration.**—As regards allegations of consideration, the bill will be upheld if it distinctly recites either of three things: First, that the conveyance was wholly without consideration; second, that it was fraudulent and there was a consideration which, in cases of technical or constructive fraud, the complainant was willing to allow or has offered to return; or third, that the complainant is not informed and has no means of ascertaining whether there was a consideration, and that these facts are peculiarly within the defendant's knowledge. In this latter case the bill should pray for a discovery.[1]

§ 145. **Fraudulent intent.**—It is usually of vital importance that the creditor should allege in the bill that the conveyance attacked was made with the intent to hinder, delay, or defraud creditors.[2] The effect of intent, as related to fraudulent alienations, is elsewhere made a special subject of discussion.[3] We may here observe that an averment to the effect that the grantee, the debtor's wife, gave no consideration, and that the whole consideration came from the debtor, sufficiently shows bad faith or fraudulent intent on her part.[4]

§ 146. **Pleading in equity.**—The plaintiff's title and claim to the assistance of a court of equity must always be exposed by the pleadings; but the style and character of pleading in equity has always been of a more liberal cast than is permitted in other courts,[5] as mispleading in matter of form has never been held to prejudice a party, provided

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though he has debts unpaid; and if he does this in good faith and hope of a more prosperous fortune, he violates no moral or legal duty. And this is so, although at the time of purchase he is aware that his property is not sufficient to pay his debts (Nichols v. Pinner, 18 N. Y. 295). The principle of this rule applies to the managers of corporations (Scott v. Depeyster, 1 Edw. Ch. [N. Y.] 513; Hodges v. New England Screw Co., 1 R. I. 312)."

[1] Des Moines & M. R. Co. v. Alley, 16 Fed. Rep. 733. See § 147.

[2] See Morgan v. Bogue, 7 Neb. 434. See §§ 9, 10, 11.

[3] See Chap. XIV. See §§ 9, 10, 11.

[4] Newman v. Cordell, 43 Barb. (N. Y.) 448.

[5] See § 60.

the whole case is just and right in matter of substance, and supported by proper evidence.[1] As a creditors' bill is often brought for a discovery as well as for relief, the complainant is at liberty to avail himself of any objections to proceedings on the part of the defendant affecting his rights, even though not specified or charged in the bill. This rule results from the necessity of the case, as a creditor cannot be supposed to be thoroughly acquainted with the conduct of his debtor toward third persons, especially when, as is generally the case in fraudulent transactions, efforts have been made to conceal the circumstances from the public.[2]

§ 147. **Seeking discovery.**—The complainant, especially if he is prosecuting in a representative capacity, as, for instance, an assignee in bankruptcy, in seeking to set aside a fraudulent conveyance of real and personal property, has the right, as ancillary to the principal relief, to have a discovery from the defendants, and he properly seeks it with a view to supply the deficiency in his own knowledge; and his ignorance of the particulars sought not only entitles him to the discovery, but excuses the want of more precise specification of the particular fraud alleged.[3]

§ 148. **Excusing laches—Concealment of fraud.**—It frequently becomes vitally important to excuse, by appropriate recitals in the bill, apparent laches on the part of the creditor in commencing the suit. In Forbes v. Overby,[4] which was a bill filed by an assignee, charging fraud and conspiracy, and praying for a discovery and disclosure, the defendants contended, upon a motion to dissolve an injunction, that the bill was insufficient in form and substance,

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[1] Tiernan v. Poor, 1 Gill & J. (Md.) 216; S. C. 19 Am. Dec. 225. See § 60. Ridgely v. Bond, 18 Md. 450; Warner v. Blakeman, 4 Keyes (N. Y.) 507.

[2] Burtus v. Tisdall, 4 Barb. (N. Y.) 580.

[3] Verselius v. Verselius, 9 Blatchf. 190, per Woodruff, J. See Bowden v. Johnson, 107 U. S. 263, per Blatchford, J.; *Ex parte* Boyd, 105 U. S. 653, 655; Hendricks v. Robinson, 2 Johns. Ch. (N. Y.) 283; Mountford v. Taylor, 6 Ves. Jr. 788.

[4] 4 Hughes, 441, 444.

and ought to be dismissed; first, because of complainant's laches in bringing this suit (it having been brought within a year from the discovery of the clue to the fraud); and second, because the bill failed to set forth specifically the impediments to an earlier prosecution of the claim. It was objected that the bill did not explain why the complainant had remained in ignorance of his rights, and that it failed to recite the methods employed by defendants to fraudulently keep the complainant in such ignorance; and that it did not disclose how and when the complainant first came to a knowledge of the matters alleged as the basis of the suit. The court observed that there had been a great variety of decisions upon the question as to what lapse of time was sufficient to bar cases of this character, and declared the general rule to be that each suit must be governed by its own peculiar circumstances. The case under consideration, being a bill for a discovery, was distinguished by the court, on that ground, from Badger v. Badger,[1] and it was said that a court would not compel a complainant, who was manifestly ignorant of the particulars of a fraud, to set out in his bill the very particulars concerning which a disclosure was sought.

Lord Erskine said: "No length of time can prevent the unkennelling of a fraud." In Alden v. Gregory,[2] Lord Northington exclaims: "The next question is in effect whether delay will purge a fraud? Never while I sit here! Every delay arising from it adds to the injustice, and multiplies the oppression." Mr. Justice Story stated the rule as follows:[3] "It is certainly true that length of time is no bar to a trust clearly established; and in a case where fraud is imputed and proved, length of time ought not, upon principles of eternal justice, to be admitted to repel relief. On the contrary, it would seem that the length of

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[1] 2 Wall. 87, and *infra*.

[2] 2 Eden, 285.

[3] Prevost v. Gratz, 6 Wheat. 497.

time during which the fraud has been successfully concealed and practiced is rather an aggravation of the offense, and calls more loudly upon a court of equity to give ample and decisive relief." It must be remembered, however: First, that the trust must be "clearly established"; second, that the facts must have been fraudulently and successfully concealed by the trustee from the knowledge of the *cestui que trust*.[1] Long acquiescence and laches by parties out of possession, are productive of much hardship and injustice to others, and cannot be excused but by showing some actual hindrance or impediment caused by the fraud or concealment of the parties in possession which will appeal to the conscience of the chancellor. The party who makes such an appeal should set forth in his bill specifically what the impediments to an earlier prosecution of his claim were, how he came to be so long ignorant of his rights, and the means used by the respondent to fraudulently keep him in ignorance; and how and when he first came to a knowledge of the matters alleged in the bill. Otherwise the courts will not grope after the truth of facts involved in the mists and obscurity consequent upon a great lapse of time.

§ 149. **Explaining delay—Discovery of fraud.**—In cases where it is sought to avoid the statute of limitations, or rather to come within the exception to it, the plaintiff has been held to stringent rules of pleading and evidence. "Especially must there be distinct averments as to the time when the fraud, mistake, concealment, or misrepresentation was discovered, and what the discovery is, so that the court may clearly see whether, by ordinary diligence, the discovery might not have been before made."[2] This is necessary to enable the defendant to meet the fraud and disprove

[1] Badger v. Badger, 2 Wall. 92.

[2] Wood v. Carpenter, 101 U. S. 140; Stearns v. Page, 7 How. 819, 829; National Bank v. Carpenter, 101 U. S. 567; Rosenthal v. Walker, 111 U. S. 190; Wollensak v. Reiher, 115 U. S. 96.

the alleged time of its discovery.[1] A general allegation of ignorance at one time, and of knowledge at another, is of no effect. If the plaintiff made any particular discovery, it should be stated when it was made, what it was, how it was made, and why it was not made sooner.[2] Fraud that will arrest the running of the statute must be secret and concealed, and not patent or known.[3] The party seeking to elude the statute by reason of fraud must aver and show that he used due diligence to detect it; and if he had the means of discovery in his power he will be held to have known it.[4] In Cole v. McGlathry[5] it appeared that the plaintiff had provided the defendant with money to pay certain debts. The defendant falsely affirmed that he had paid them, and fraudulently kept possession of the money. It was decided that the plaintiff was not entitled to recover for the reason that he had at all times the means of discovering the truth of the statements by making inquiries of the parties who should have received the money. This principle is further illustrated in the analogous case of McKown v. Whitmore,[6] in which it appeared that the plaintiff had handed the defendant money to be deposited for the plaintiff in bank. The defendant told the plaintiff that he had made the deposit. It was held that even though the statement was false, and made with a fraudulent design, the plaintiff could not recover because he might at all times have inquired at the bank and learned the truth.[7] In Boyd

[1] Moore v. Greene, 19 How. 72; Beaubien v. Beaubien, 23 Id. 190; Badger v. Badger, 2 Wall. 95.

[2] Carr v. Hilton, 1 Curt. C. C. 230.

[3] Martin v. Smith, 1 Dill. 85. This case contains a full review of the authorities. See also McLain v. Ferrell, 1 Swan (Tenn.) 48; Buckner v. Calcote, 28 Miss. 432; Cook v. Lindsey, 34 Miss. 451; Phalen v. Clark, 19 Conn. 421; Moore v. Greene, 2 Curt. C. C. 202, affi'd 19 How. 69, 72; Rosenthal v. Walker, 111 U. S. 189; Bailey v. Glover, 21 Wall. 342; Gifford v. Helms, 98 U. S. 248; Upton v. McLaughlin, 105 U. S. 640.

[4] Buckner v. Calcote, 28 Miss. 432, 434. See Nudd v. Hamblin, 8 Allen (Mass.) 130. Compare Baldwin v. Martin, 35 N. Y. Super. Ct. 98; Barlow v. Arnold, 6 Fed. Rep. 355; Erickson v. Quinn, 3 Lans. (N. Y.) 302.

[5] 9 Me. 131.

[6] 31 Me. 448.

[7] See, further, Rouse v. Southard, 39 Me. 404.

v. Boyd,[1] it was ruled that the concealment which would avoid the statute must go beyond mere silence. It must be something done to prevent discovery. The concealment must be the result of positive acts.[2] An allegation that the defendants pretended and professed to the world that the transactions were *bona fide* was looked upon as being too general. In Wood v. Carpenter,[3] a pleading which read as follows: "And the plaintiff further avers that he had no knowledge of the facts so concealed by the defendant until the year A.D. 1872, and a few weeks only before the bringing of this suit," was held to be clearly bad. The court in this case, in a critical and exhaustive opinion, review many of the cases which have just been considered, and then observe that a wide and careful survey of the authorities leads to the following conclusions: First, the fraud and deceit which enabled the offender to do the wrong may precede its perpetration. The length of time is not material, provided there is the relation of design and its consummation. Second, concealment by mere silence is not enough. *There must be some trick or contrivance intended to exclude suspicion and prevent inquiry.* Third, there must be reasonable diligence, and the means of knowledge are the same thing in effect as knowledge itself. Fourth, the circumstances of the discovery must be fully stated [pleaded] and proved, and the delay which has occurred must be shown to be consistent with the requisite diligence.[4]

§ 150. **Complaints bad for multifariousness.**—Judge Story says that multifariousness is "the improperly joining in one bill distinct and independent matters, and thereby con-

[1] 27 Ind. 429.

[2] Stanley v. Stanton, 36 Ind. 445.

[3] 101 U. S. 135.

[4] In Erickson v. Quinn, 47 N. Y. 413, Rapallo, J., said: "The fundamental fact from which the conclusion of a fraudulent intent is drawn, is the absence of any valuable consideration for the conveyance. So long as the creditor was ignorant of that essential and controlling fact, the statute ought not to run against him."

founding them; as, for example, the uniting in one bill of several matters, perfectly distinct and unconnected, against one defendant, or the demand of several matters of a distinct and independent nature against several defendants in the same bill."[1] "What is more familiarly understood by multifariousness as applied to a bill, is where a party is brought as a defendant upon a record, with a large portion of which, and of the case made by which, he has no connection whatsoever."[2] In United States v. Bell Telephone Company,[3] Mr. Justice Miller used these words: "The principle of multifariousness is one very largely of convenience, and is more often applied where two parties are attempted to be brought together by a bill in chancery who have no common interest in the litigation, whereby one party is compelled to join in the expense and trouble of a suit in which he and his co-defendant have no common interest, or in which one party is joined as complainant with another party with whom in like manner he either has no interest at all, or no such interest as requires the defendant to litigate it in the same action."[4] The authorities bearing upon this question are very numerous, but there is deducible from them all no positive inflexible rule as to what, in the sense of courts of equity, constitutes multifariousness, which is fatal on demurrer.[5] Indeed it seems to be generally recognized as an impossibility to formulate a general rule as to what is considered multifariousness; every case must be governed by its own circumstances, and the court must exercise a sound discretion on the subject.[6] The rule

[1] Story's Ex. Pl. § 271. See Walker v. Powers, 104 U. S. 251.

[2] Story's Eq. Pl. § 530. See Campbell v. Mackay, 1 Mylne & Cr. 617.

[3] 128 U. S. 352.

[4] Citing Oliver v. Piatt, 3 How. 333; Walker v. Powers, 104 U. S. 245.

[5] DeWolf v. Sprague Mfg. Co., 49 Conn. 292. See generally Att'y General v. Cradock, 3 Mylne & Cr. 85; Knye v. Moore, 1 Sim. & S. 61; Kensington v. White, 3 Price 164; Cornwell v. Lee, 14 Conn. 524; Middletown Sav. Bank v. Bacharach, 46 Conn. 522.

[6] Gaines v. Chew, 2 How. 619; Oliver v. Piatt, 3 How. 333. See McLean v. Lafayette Bank, 3 McLean 415; Abbot v. Johnson, 32 N. H. 26; Carter v. Kerr, 8 Blackf. (Ind.) 373; Butler v. Spann, 27 Miss. 234; Brown

in relation to multifariousness, say the Supreme Court in Iowa, is one of convenience, and though the matters set forth in the pleading are distinct, yet if justice can be administered between the parties without a multiplicity of suits, the objection will not prevail.[1] The objection that the bill is multifarious is always discouraged by the courts when, instead of advancing, it will defeat the ends of justice.[2]

§ 151. **Pleadings held not multifarious.**—Such being the general condition of the authorities as to multifarious pleadings, it follows that the practitioner must rely upon instances and illustrations drawn from reported cases, for his guidance.

In a suit before the Supreme Judicial Court of New Hampshire,[3] it was decided that it was not multifarious to join in a creditor's bill, as parties defendant with the debtor, several persons to whom he conveyed distinct parcels of property, out of which the creditor sought satisfaction of his debt, although such persons might have no common interest in the several parcels conveyed.[4] And in Dimmock v. Bixby,[5] it was held that a demurrer for multifariousness would hold good only when the plaintiff claimed several matters of a different nature, and not when one general right was asserted, although the defendants might have separate and distinct rights. The same principle is recognized in Boyd v. Hoyt.[6] That was a case of a creditor's bill brought to reach property of a judgment-debtor which

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v. Haven, 12 Me. 164; Richards v. Pierce, 52 Me. 560; Warren v. Warren, 56 Me. 360; Bugbee v. Sargent, 23 Me. 269; Weston v. Blake, 61 Me. 452. See § 132.

[1] Bowers v. Keesecher, 9 Iowa 422.

[2] Marshall v. Means, 12 Ga. 61. Where two distinct subjects are embraced in a bill, *e. g.*, the avoidance of a marriage settlement and the annulment of a will, though the necessary parties to the suit may be the same, their interests and attitude are decidedly at variance, and the bill is bad for multifariousness. McDonnell v. Eaton, 18 Fed. Rep. 710.

[3] Chase v. Searles, 45 N. H. 519.

[4] See §§ 54, 55, 132.

[5] 20 Pick. (Mass.) 377.

[6] 5 Paige (N. Y.) 65. See Rinehart v. Long, 95 Mo. 396.

had been fraudulently transferred to two or more persons holding different portions of it by distinct conveyances, and it was decided that such persons might be joined. The chancellor lays it down that when the object of a suit is single, but different persons have or claim separate interests in distinct or independent matters, all connected with and arising out of the single object of the suit, the complainant may bring such persons before the court as defendants, so that the whole object of the bill may be effected in one suit, and further unnecessary and useless litigation prevented. The case of Morton v. Weil [1] is an important illustration in point. Creditors by different judgments united in bringing a suit against the executors under the will of a decedent, alleging the fraud of that person in contracting the debts, and joined as defendants various parties having liens upon, or title to, the property in question by reason of judgments or assignments, alleging that such liens or titles were fraudulently obtained, and praying that the same might be vacated, and the defendants compelled to account for and pay over the property. On demurrer to the bill it was decided that the parties to it were properly joined, and that in other respects it was sufficient.[2] In another case,[3] a creditors' bill filed against the debtor and his grantees, for the purpose of setting aside a number of voluntary conveyances, severally made to each of the parties, was held to be good. And in Harrison v. Hallum,[4] the court say that it is proper, where there are several judgment-debtors in the same judgment, and one of them has made a fraudulent conveyance to one grantee, and another has made a similar conveyance to another grantee, and a third has

[1] 33 Barb. (N. Y.) 30.

[2] See Lawrence v. Bank of the Republic, 35 N. Y. 320; Reed v. Stryker, 12 Abb. Pr. (N. Y.) 47; Fellows v. Fellows, 4 Cow. (N. Y.) 682; Lewis v. St. Albans Iron & Steel Works, 50 Vt. 481; Arnold v. Arnold, 11 W. Va. 449. See, further, Way v. Bragaw, 16 N. J. Eq. 213; Hicks v. Campbell, 19 N. J. Eq. 183; Randolph v. Daly, 16 N. J. Eq. 313.

[3] Williams v. Neel, 10 Rich. Eq. (S. C.) 338.

[4] 5 Coldw. (Tenn.) 525.

made a like conveyance to still another grantee, to unite all the debtors and their several fraudulent grantees in one common bill for the relief of the judgment-creditors. Again, where a debtor, with intent to defraud his creditors, purchased land, causing the deed to be made to his wife, who participated in the fraud and conveyed the land to another person with the same intent, who in turn conveyed it to a third, both grantees being cognizant of the fraud, it was held, in an action brought by a creditor to set aside the conveyances, that both transactions being of the same nature, though different in form, could be properly joined in the same complaint.[1] A bill is not regarded as multifarious, though brought to recover different portions of the estate of a debtor, from several defendants, if the alleged illegal transfers were the result of a common purpose on the part of the defendants to dismember the estate.[2]

§ 152. — The cases upon this subject are almost without number. In De Wolf v. Sprague Mfg. Co.,[3] it appeared that the plaintiff held a judgment lien upon certain real estate upon which a trust-mortgage had been executed, which, if valid, was entitled to priority. The suit was brought to set aside or postpone the mortgage, on the ground that it was void against the complaining creditor, and for a foreclosure of the judgment lien, and for possession, and the mortgagors and the trust-mortgagee were made defendants. The court, after protracted argument and an extended review of the authorities, held that the bill was not multifarious. In Parker v. Flagg[4] the court say: "The bill is brought by the executor, representing all the creditors of an insolvent estate, to set aside conveyances made by the testator of all his property, real and personal, in fraud of

[1] North v. Bradway, 9 Minn. 183.

[2] Van Kleeck v. Miller, per Choate, J., 19 N. B. R. 486; citing Boyd v. Hoyt, 5 Paige (N. Y.) 65; Platt v. Preston, 19 N. B. R. 241.

[3] 49 Conn. 282.

[4] 127 Mass. 30.

those creditors, to his wife, who is the sole defendant; some of the property consists of mortgages, to recover which the plaintiff has no adequate remedy at law; all the conveyances appear to have been part of one scheme, and no objection is, nor, it would seem, could be taken to the bill for multifariousness. The demurrer was erroneously sustained, and should have been overruled."[1] It is perhaps unnecessary to further multiply illustrations. Some of the cases have certainly gone to an extreme limit, and parties have been held together as defendants in one action by a very slender thread of reasoning. The St. Louis Court of Appeals, commenting upon the subject, say: "The principle that it is not sufficient that the defendants are all concerned in some general charge, such as fraud on the part of the debtor, or that as grantees of distinct properties by distinct conveyances they obtained title through him, but that all the defendants should at least have an interest in the principal point in issue in the case, is surely of some value as a general test. In cases like the present it would be decisive. Here there is no material issue in which all the defendants have a common interest, and consequently no tie to make them defendants in one suit. . . . . It is obvious that, merely from convenience to plaintiffs, the defendants ought not to be put to the trouble and expense of litigating matters with which they are unconnected."[2] These observations were made in a case in which there were twenty defendants having a common source of title from an alleged fraudulent grantor; the conveyances were separate and made at different times, and the defendants were beneficiaries and trustees indiscriminately joined. The bill was pronounced multifarious. The decision, however, can scarcely be harmonized with some of the authorities already discussed.[3]

[1] Chase v. Redding, 13 Gray (Mass.) 418; Welsh v. Welsh, 105 Mass. 229; Gilson v. Hutchinson, 120 Mass. 27.

[2] Bobb v. Bobb, 8 Mo. App. 260.

[3] As to bills held not to be multifarious, see Richmond v. Irons, 121 U. S. 27.

§ 153. **Alternative relief.**—In Alabama it was held that a creditors' bill may be filed for a double purpose; asking in the alternative to have two or more conveyances cancelled as intended to hinder, delay, and defraud creditors, or to have them construed as together constituting a general assignment inuring, under the statute of that State, to the benefit of all the insolvent's creditors equally.[1] But in a later case in that State[2] the court feel constrained to depart from and overrule the decision upon this point.

§ 154. **Attacking different conveyances.**—The fact that a plaintiff seeks to set aside two or more conveyances as fraudulent, does not require that each conveyance shall be set forth in a separate paragraph as the basis of a separate cause of action. They constitute but one cause of action, the fraudulent disposition of his property by the judgment-debtor.[3]

§ 155. **Prayer of complaint—Variance—Verification.**—As a general rule in the modern procedure a mistake in the demand for relief is not fatal.[4] In Buswell v. Lincks[5] the court said: "The point is made that the bill was framed upon the basis of a claim that there had been a fraudulent trust-deed, and a receiver had been prayed for, while the relief given in setting aside the fraudulent conveyance and adjudging a sale of the leasehold under execution was inconsistent with the prayer of the complaint. The sufficient answer to this proposition is, that the judgment was such as the court was bound to give upon the allegations and proofs without reference to the relief demanded." And where the bill, in addition to the general demand for relief, contained a prayer that a deed be set aside, it was held that, merely because of a prayer that the defendant be de-

[1] Crawford v. Kirksey, 50 Ala. 591.
[2] Lehman v. Meyer, 67 Ala. 404.
[3] Strong v. Taylor School Township, 79 Ind. 208.
[4] See Bell v. Merrifield, 109 N. Y. 202.
[5] 8 Daly (N. Y.) 527.

creed to give the complainant possession of the land, the bill would not be treated as a bill for possession, nor dismissed on the ground that ejectment was the proper remedy.[1] As a general rule complainants are entitled, under a prayer for general relief, to any judgment consistent with the case made in their bill,[2] but they are not usually entitled to a decree covering and including matters not referred to in the pleadings, and as to which the respondents have never had their day in court.[3] The court will not hesitate to dismiss a bill which presents a case totally different from the testimony in the record;[4] and no decree can ordinarily be made on grounds not stated in the bill.[5] "The rule is explicit and absolute, that a party must recover in chancery according to the case made by his bill or not at all, '*secundum allegata*' as well as '*probata.*'"[6] Matters not charged in the bill should not be considered on the hearing.[7] If, however, the special prayers are inapt and incongruous, and so framed that no relief can be granted under them, the court under the prayer for general relief may render any appropriate judgment consistent with the case made by the bill.[8] Courts of equity give judgment for money only where that is all the relief needed.[9]

The objection that a bill is not verified is immaterial, as a bill in equity need not usually be sworn to unless it is sought to use it as evidence upon an application for a provisional injunction or other similar relief.[10]

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[1] Miller v. Jamison, 24 N. J. Eq. 41. See Sedg. & Wait on Trial of Title to Land, 2d ed., § 169.

[2] Bell v. Merrifield, 109 N. Y. 206.

[3] Wilson v. Horr, 15 Iowa 492; Tripp v. Vincent, 3 Barb. Ch. (N. Y.) 613; Parkhurst v. McGraw, 24 Miss. 139; Hovey v. Holcomb, 11 Ill. 660.

[4] Roberts v. Gibson, 6 H. & J. (Md.) 123; Truesdell v. Sarles, 104 N. Y. 168.

[5] Bailey v. Ryder, 10 N. Y. 363; Wright v. Delafield, 25 N. Y. 266; Gordon v. Reynolds, 114 Ill. 123.

[6] Bailey v. Ryder, 10 N. Y. 370; Clark v. Krause, 2 Mackey (D. C.) 573; Eyre v. Potter, 15 How. 42.

[7] Hunter v. Hunter, 10 W. Va. 321.

[8] Annin v. Annin, 24 N. J. Eq. 188.

[9] Bell v. Merrifield, 109 N. Y. 207; Murtha v. Curley, 90 N. Y. 372.

[10] Hughes v. Northern Pacific R.R. Co., 1 West Coast Rep. 24.

§ 156. **Amendment.**—A variance between the actual date of the judgment and that set forth in a creditors' bill based on it, may be corrected by amendment at any time during the proceedings; but as the complainant is not absolutely confined to the exact date stated in the bill the amendment may be unnecessary.[1] An amendment of a bill as to the description of the property under well-established rules of procedure only operates from the time of the service of the amended pleading.[2] The bill may be amended on the final hearing in the United States Circuit Court, so as to state that the value of the matter in dispute exceeds five hundred dollars.[3] Speaking upon the subject of amendments, Davis, J., said, in Neale v. Neales:[4] "To accomplish the object for which a court of equity was created, it has the power to adapt its proceedings to the exigency of each particular case, but this power would very often be ineffectual for the purpose, unless it also possessed the additional power, after a cause was heard and a case for relief made out, but not the case disclosed by the bill, to allow an alteration of the pleadings on terms that the party not in fault would have no reasonable ground to object to. That the court has this power and can, upon hearing the cause, if unable to do complete justice by reason of defective pleadings, permit amendments, both of bills and answers, is sustained by the authorities."[5] The granting of amendments of pleadings in chancery rests in the sound discretion of the court.[6]

§ 157. **Description.**—Aside from interests not liable to execution, the fact that a creditor is compelled to file a bill in equity usually implies ignorance on his part of the exact character and form in which the debtor has invested or

[1] First Natl. Bank of M. v. Hosmer, 48 Mich. 200.

[2] Miller v. Sherry, 2 Wall. 250.

[3] Collinson v. Jackson, 8 Sawyer 358.

[4] 9 Wall. 8.

[5] Citing Mitford's Chancery Pleading, 326, 331; Story's Equity Pleading, §§ 904, 905; Daniel's Chancery Pr. & Pl. 463, 466; Smith v. Babcock, 3 Sumner 583; McArtee v. Engart, 13 Ill. 242.

[6] Gordon v. Reynolds, 114 Ill. 118.

secreted his property. If such were not the case, process of execution would be invoked. It should not, therefore, be necessary to particularly describe or indicate in the complaint, the assets, whether legal or equitable, which it is proposed to reach by the bill.[1] Thus a bill was entertained which alleged that the defendant "has equitable interests, things in action, and other property which cannot be reached by execution, and that he has also debts due to him from persons unknown."[2] In Miller v. Sherry[3] the original bill was in the form of a creditor's bill. It contained nothing specific except as to certain transactions between the debtor and one Richardson. There was no other part of the bill upon which issue could be taken as to any particular property. The court held that it was effectual for the purpose of creating a general lien upon the assets of the debtor, as a means of discovery, and as the foundation for an injunction and an order that the debtor execute a conveyance to a receiver. Furthermore, that if it became necessary to litigate as to any specific claim, other than that against Richardson already specified, an amendment to the bill would have been indispensable. The bill did not create a *lis pendens*[4] operating as notice affecting any real estate. To have that effect the recital in the description must be so definite that any one reading it can thereby learn what property is intended to be made the subject of the litigation.[5] Where the complainant in a creditor's bill seeks to obtain satisfaction out of lands inherited or devised, and is

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[1] Shainwald v. Lewis, 6 Fed. Rep. 766.

[2] Lanmon v. Clark, 4 McLean 18. "The jurisdiction of a court of equity to reach the property of a debtor justly applicable to the payment of his debts, even when there is no specific lien on the property, is undoubted." Public Works v. Columbia College, 17 Wall. 530.

[3] 2 Wall. 249.

[4] As to the application of the doctrine of *lis pendens* to creditors' suits, see Webb v. Read, 3 B. Mon. (Ky.) 119; Jackson v. Andrews, 7 Wend. (N. Y.) 152.

[5] See Griffith v. Griffith, 9 Paige (N. Y.) 317. Compare Sharp v. Sharp, 3 Wend. (N. Y.) 278; King v. Trice, 3 Ired. (N. C.) Eq. 573; McCauley v. Rodes, 7 B. Mon. (Ky.) 462.

unable to specify the lands, he may state that fact in the bill, and call upon the heirs to discover the lands devised or inherited, so that they may be reached by amendment of the bill or otherwise.[1] If the description be indefinite it may be aided by the evidence.[2]

The rule that an alienation of property made during the pendency of an action is subject to the final decree is, as shown by Mr. Bishop,[3] of very ancient origin. Murray v. Ballou[4] is the leading case in this country. The doctrine is important both as regards the titles of purchasers and the question of preferences among judgment-creditors. In Scouton v. Bender,[5] where an assignment was overturned, it was decided that the creditors were entitled to satisfaction of their judgments, respectively, out of the funds derived from the real estate in the order of priority of the judgments; and out of the personal fund in the order in which the bills were filed and the equitable liens created. The doctrine of *lis pendens*, it may be further remarked, is said to have no application to corporate stock,[6] or negotiable securities.[7] Mr. Justice Bradley said in County of Warren v. Marcy:[8] "Whilst the doctrine of constructive notice arising from *lis pendens*, though often severe in its application, is, on the whole, a wholesome and necessary one, and founded on principles affecting the authoritative administration of justice, the exception to its application is demanded by other considerations equally important, as affecting the free operations of

[1] Parsons v. Bowne, 7 Paige (N. Y.) 354. See § 147.

[2] Williams v. Ewing, 31 Ark. 235. The circumstance that a deed did not give an accurate description of the land intended to be conveyed will not defeat a settlement where the description used could leave no one in serious doubt as to the land intended. Wallace v. Penfield, 106 U. S. 263.

[3] Bishop on Insolvent Debtors, Supplement; § 228*a*.

[4] 1 Johns. Ch. (N. Y.) 566. See Tilton v. Cofield, 93 U. S. 168.

[5] 3 How. Pr. (N.Y.) 185. See § 132*a*.

[6] Holbrook v. New Jersey Zinc Co., 57 N. Y. 616.

[7] County of Warren v. Marcy, 97 U. S. 96.

[8] 97 U. S. 109.

commerce, and that confidence in the instruments by which it is carried on, which is so necessary in a business community."[1] An attempt to discuss the various phases of the law of *lis pendens* is not possible in this connection. The exceptions that have crept into the rule that a party who meddles with property in controversy does so at his peril have frequently brought the proceedings of diligent creditors to naught.

§ 157*a*. **Change of venue—Territorial jurisdiction.**—In New York State a motion to change the place of trial of an action, brought to annul a fraudulent conveyance, to the county in which certain real estate passing under the assignment is situated, cannot be defeated by an offer on the part of the plaintiff to stipulate that he will not attempt to reach such real estate.[2] When a court of equity attempts to act directly upon real or personal property by its decree the property must be within the territorial jurisdiction of the court. "It is equally well settled that where one is the owner of land or other property in a foreign jurisdiction, which in equity and good conscience he ought to convey to another, the latter may sue him in equity in any jurisdiction in which he may be found, and compel him to convey the property. The decree in such case directing a conveyance of the property does not directly affect the title to the property, yet the enforcement of it does result in the complete change of the title."[3]

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[1] For phases of the doctrine of *lis pendens*, and of the rule as to the preference obtained by filing a bill, see Leitch v. Wells, 48 N. Y. 585; Fitch v. Smith, 10 Paige (N. Y.) 9; Albert v. Back, 20 J. & S. (N. Y.) 550, affi'd 101 N. Y. 656; Davenport v. Kelly, 42 N. Y. 193; Van Alstyne v. Cook, 25 N. Y. 489; Becker v. Torrance, 31 N. Y. 631; Boynton v. Rawson, 1 Clarke (N. Y.) 584; Claflin v. Gordon, 39 Hun (N. Y.) 57; Shand v. Hanley, 71 N. Y. 324.

[2] Wyatt v. Brooks, 42 Hun (N. Y.) 502. Compare Acker v. Leland, 96 N. Y. 384.

[3] Johnson v. Gibson, 116 Ill. 294.

CHAPTER X.

OF THE PLEA OR ANSWER.

§ 158. Answer and burden of proof.
159. Avoiding denial.
160. Answer as evidence for or against co-defendant.
161. Pleading to the discovery and the relief.
162. Particularity of denial in answer.
§ 162*a*. Bill of particulars.
163. Denying fraud or notice.
164. Admission and avoidance.
165. Avoiding discovery.
166. Affirmative relief.
167. Waiver of verification.

§ 158. **Answer and burden of proof.**—Usually, as we have seen, in creditors' actions to reach assets, or bills in equity to annul fraudulent alienations, the debtor and the fraudulent alienees are made parties defendant. The latter are necessary parties to the end that the judgment may conclude them, and the court obtain jurisdiction over and possession of the assets in their hands, and annul the colorable transfer. It is manifest that the defendant alienee has rights in the suit different from and superior to those of the debtor. The latter is of course concluded by the judgment upon which the bill proceeds, and can withhold from his creditor nothing but exempt property. The alienee, on the other hand, may claim to be a *bona fide* purchaser, or may show the absence of actual fraud, and thus be allowed to hold the property as security for advances. The grantor may "intend a fraud, but if the grantee is a fair, *bona fide*, and innocent purchaser, his title is not to be affected by the fraud of his grantor."[1] It follows that the alienee cannot be prejudiced by the fact that judgment *pro confesso* passes

[1] Sands v. Hildreth, 14 Johns. (N. Y.) 498, per Spencer, J.; Hollister v. Loud, 2 Mich. 310; Kittering v. Parker, 8 Ind. 44. See Chap. XXIV.

against the debtor,[1] or that fraud is admitted or alleged in the debtor's answer.[2] The defense that a party is a *bona fide* purchaser is an affirmative defense only in cases where fraud in some previous holder of the title has been shown,[3] and ordinarily a sworn answer responsive to a direct interrogatory or specific charge of fraud must be accepted as true until disproved.[4] Fraud, as we have already seen,[5] is not a thing to be presumed, but must be proved and established by evidence sufficient for that purpose,[6] although, as already made manifest,[7] it is sometimes practically a legal deduction from uncontroverted facts, or from evidence the weight of which is practically conclusive.[8]

Where a defendant's title is attacked on the ground of fraud he may, under a general denial, introduce any proof showing that his title is not fraudulent.[9]

§ 159. **Avoiding denial.**—The general rule prevails, under equity procedure, that an answer under oath, so far as it is responsive, is to be taken as true unless overcome by competent proof.[10] When the defendant, by his answer under oath, has expressly negatived the allegations of the bill, and the testimony of only one person has affirmed what has been negatived, the court will not decree in favor of the complainant. There is then oath against oath.[11] The complainant generally calls upon the defendant to answer on oath, and is therefore bound to admit the answer, so far as he has called for it, to be *prima facie* true, and as much worthy of credit as the testimony of any witness. This rule does not extend, however, to averments embodied in

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[1] Thames v. Rembert, 63 Ala. 561. See Dick v. Hamilton, 1 Deady 322; Fulton v. Woodman, 54 Miss. 158–173.

[2] See Scheitlin v. Stone, 43 Barb. (N. Y.) 637.

[3] Fulton v. Woodman, 54 Miss. 172.

[4] Fulton v. Woodman, 54 Miss. 159; Hartshorn v. Eames, 31 Me. 98.

[5] See § 6.

[6] Grover v. Grover, 3 Md. Ch. 35.

[7] See §§ 9, 10.

[8] See § 10.

[9] Ray v. Teabout, 65 Iowa 157.

[10] Wright v. Wheeler, 14 Iowa 13; Allen v. Mower, 17 Vt. 61; Parkhurst v. McGraw, 24 Miss. 134.

[11] Jacks v. Nichols, 5 N. Y. 178.

the answer not directly responsive to the allegations contained in the bill, since the complainant has not called for such averments.[1] Allegations not responsive to the bill, if denied by a general replication, must be proved before becoming available to the party making them.[2] In Green v. Tanner[3] the court said: "That the answer, being responsive to the bill, is evidence for the defendants as to facts within their own knowledge, is not denied. And by a well-established rule of equity, the answer must be taken to be true, unless contradicted by two witnesses, or by one witness with probable and corroborating circumstances."[4] In Bowden v. Johnson[5] it was contended by counsel that, as the bill prayed that the defendant should answer its allegations on oath, the answer was evidence in his favor, and was to be taken as true unless it was overcome by the testimony of one witness, and by corroborating circumstances equivalent to the testimony of another witness. The court found facts "sufficient to satisfy the rule of equity," and cite from Greenleaf[6] to the effect "that the sufficient evidence to outweigh the force of an answer may consist of one witness, with additional and corroborative circumstances, which circumstances may sometimes be found in the answer itself; or it may consist of circumstances alone, which, in the absence of a positive witness, may be sufficient to outweigh the answer even of a defendant who answers on his own knowledge."[7] It seems that the credibility of the defendants' answers setting forth consideration, will be destroyed by proof that the vendee permitted the vendor to assert in his hearing, without contradicting him, that no indebtedness existed.[8]

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[1] Seitz v. Mitchell, 94 U. S. 582.

[2] Humes v. Scruggs, 94 U. S. 24.

[3] 8 Metc. (Mass.) 422.

[4] Flagg v. Mann, 2 Sumner 487. See Tompkins v. Nichols, 53 Ala. 198; Parkman v. Welch, 19 Pick. (Mass.) 234; Hoboken Bank v. Beckman, 33 N. J. Eq. 55.

[5] 107 U. S. 262.

[6] Greenleaf on Evidence, vol. 3, § 289.

[7] S. P. Williamson v. Williams, 11 Lea (Tenn.) 365.

[8] Bradley v. Buford, Sneed (Ky.) 12.

§ 160. **Answer as evidence for or against co-defendant.**—The equity practice seems to be settled that generally speaking the answer of one defendant cannot be used *against* another defendant.[1] In Salmon v. Smith,[2] the rule is recognized that the answer of one defendant to a bill in chancery which shows that the complainant is not entitled to the relief sought, inures in favor of his co-defendant as evidence.[3] So it is said by Mr. Greenleaf,[4] "that where the answer in question is unfavorable to the plaintiff, and is responsive to the bill, by furnishing a disclosure of the facts required, it may be read as evidence in favor of a co-defendant, especially where the latter defends under the title of the former."[5] Where the complainants choose to rely upon admissions or confessions in an answer, the denials and admissions must, of course, be considered as a whole.[6] A sworn answer should be taken as true unless overcome by the testimony,[7] but the denials to make an answer evidence must be of facts stated in the bill.[8] It may be here recalled that the testimony of a single witness, uncorroborated by circumstances, has been considered not sufficient to overcome a verified answer positively denying fraud.[9]

§ 161. **Pleading to the discovery and the relief.**—Chancellor Walworth stated in Brownell v. Curtis,[10] that, in certain cases, where the discovery asked for would tend to crimi-

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[1] Salmon v. Smith, 58 Miss. 408; Powles v. Dilley, 9 Gill (Md.) 222; McKim v. Thompson, 1 Bland (Md.) 161.

[2] 58 Miss. 400, 408.

[3] Davis v. Clayton, 5 Humph. (Tenn.) 446.

[4] 3 Greenl. Ev. § 283.

[5] See Mills v. Gore, 20 Pick. (Mass.) 28; Miles v. Miles, 32 N. H. 147; Powles v. Dilley, 9 Gill (Md.) 222; Field v. Holland, 6 Cranch 8; Clason v. Morris, 10 Johns. (N. Y.) 524; Lingan v. Henderson, 1 Bland (Md.) 261. But see Cannon v. Norton, 14 Vt. 178.

[6] Crawford v. Kirksey, 50 Ala. 597.

[7] Hurd v. Ascherman, 117 Ill. 501.

[8] Gainer v. Russ, 20 Fla. 162.

[9] See Garrow v. Davis, 15 How. 272; Evans v. Bicknell, 6 Ves. 184; Lord Cranstown v. Johnston, 3 Ves. 170; Pilling v. Armitage, 12 Ves. 78; Thompson v. Sanders, 6 J. J. Marsh (Ky.) 93. Compare Allen v. Cole, 9 N. J. Eq. 286.

[10] 10 Paige (N. Y.) 214.

nate the defendant, or subject him to a penalty or forfeiture, or entail a breach of confidence, the defendant was not bound to make a discovery to aid in establishing the facts,[1] although the complainant might be entitled to relief. In the course of the opinion it was further said: "But where the same principle upon which the demurrer to the discovery of the truth of certain charges in the complainant's bill is attempted to be sustained, is equally applicable as a defense to the relief sought by the bill, the settled rule of the court is that the defendant cannot be permitted to demur as to the discovery only, and answer as to the relief.[2] This general rule is equally applicable to the case of a plea; and the defendant cannot plead any matters in bar of the discovery merely, when the matters thus pleaded would be equally valid as a defense to the relief."

§ 162. **Particularity of denial in answer.**—Chancellor Kent, in Woods v. Morrell,[3] in discussing the sufficiency of an answer to the allegations of a bill in equity, said: "The general rule is, that to so much of the bill as is material and necessary for the defendant to answer, he must speak directly, without evasion, and not by way of *negative pregnant*. He must not answer the charges merely literally, but he must confess or traverse the substance of each charge positively, and with certainty; and particular precise charges must be answered particularly and precisely, and not in a general manner, even though a general answer may amount to a full denial of the charges."[4] This rule is well illustrated in Welcker v. Price,[5] where the bill charged that the land conveyed by the debtor to his wife was "all the property of which the said John F. was possessed." The

[1] Citing Atty.-Genl. v. Brown, 1 Swanst. 294; Dummer v. Corporation of Chippenham, 14 Ves. 245; Hare on Discovery 5. See § 165.

[2] Citing Morgan v. Harris, 2 Bro. C. C. 124; Waring v. Mackreth, Forrest 129; Story's Eq. Pleadings 254, n. 1; Welf. Eq. Pleadings 133.

[3] 1 Johns. Ch. (N. Y.) 107.

[4] See Hunter v. Bradford, 3 Fla. 285; Barrow v. Bailey, 5 Fla. 23.

[5] 2 Lea (Tenn.) 667.

answer set forth that the debtor "was then in good circumstances, with means enough and more than enough to pay all his debts." This latter statement was characterized as a mere legal conclusion which a party was not permitted to draw for himself, or to express an opinion concerning, without disclosing facts to justify it, and as being a mere evasion of the real issue as to the possession of other property.

It is a familiar rule that a positive denial of fraud in an answer will not prevail against admissions, in the same pleading, of facts which show that the transaction was fraudulent;[1] also, that in weighing the whole evidence in the case, the fact that the defendant answers only generally, denying the fraud, will operate against him whenever the bill charges him with particular acts of fraud.[2] A charge in a bill that the deed in question was never properly delivered, and that the grantor retained possession after the conveyance, should, if untrue, be specifically denied.[3]

§ 162*a*. **Bill of particulars.**—The granting of an order for a bill of particulars in an action rests largely in the sound discretion of the court. Such orders have been granted in almost every form of action.[4] In a Special Term case in New York, prosecuted to set aside an assignment as having been made in fraud of creditors, Lawrence, J., ordered the plaintiff to furnish certain preferred creditors with a bill of particulars of the times, places, acts, and things which it was intended to prove as showing the fraudulent intent.[5] A similar application was denied in a later case upon

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[1] Robinson v. Stewart, 10 N. Y. 194; Jackson v. Hart, 11 Wend. (N. Y.) 349, per Savage, Ch. J. See Hoboken Bank v. Beckman, 33 N. J. Eq. 53; Sayre v. Fredericks, 16 N. J. Eq. 205.

[2] Hudgins v. Kemp, 20 How. 52.

[3] Parkman v. Welch, 19 Pick. (Mass.) 234.

[4] See Dwight v. Germania Life Ins. Co., 84 N. Y. 493; Tilton v. Beecher, 59 N. Y. 176.

[5] Claflin v. Smith, 13 Abb. N. C. (N. Y.) 205.

slightly dissimilar facts.[1] It would be destructive to creditors' proceedings in many cases to allow a debtor to exact in advance a bill of particulars of the specific acts of fraud relied upon to support the action. Fraud is generally established by developing a series of minute circumstances, earmarks, and *indicia*. These sometimes appear at the trial for the first time when the creditor has obtained an opportunity to explore the enemy's country by cross-examination it may be. As the presumption of good faith in all transactions rests with the defendant, and the general character of the plaintiff's cause of action must be outlined in the pleading, it would seem to be most unjust to require, in addition, a statement of the items of the creditors' evidence in advance of the trial. Creditors are considered to be a favored class, and are entitled, with proper restrictions, to "fish" through the debtor's transactions in pursuit of hidden assets, and should not be fettered by any restricting orders.

§ 163. **Denying fraud or notice.**—In order to entitle a party to protection as a purchaser without notice he must deny notice of the fraud fully and particularly, whether the defense be set up by plea or answer,[2] and even though notice is not charged in the bill.[3] A plea of *bona fide* purchaser for value and without notice, must be as full under the Code as under the former system of equity pleading.[4] We may here observe that constructive fraud is not regarded as a fact, but is treated rather as a conclusion of law drawn from ascertained facts. Hence, as has been shown,[5] where an answer denies the fraud, but nevertheless admits facts from which the existence of fraud follows, as a natural

[1] Passavant v. Cantor, 21 Abb. N. C. (N. Y.) 259.

[2] Stanton v. Green, 34 Miss. 592; Gallatin v. Cunningham, 8 Cow. (N. Y.) 374; 2 Lea. Cas. in Eq., pp. 85, 86; Miller v. Fraley, 21 Ark. 22. Compare Friedenwald v. Mullan, 10 Heisk. (Tenn.) 226.

[3] Manhattan Co. v. Evertson, 6 Paige (N. Y.) 466.

[4] Weber v. Rothchild, 15 Ore. 388.

[5] See § 162.

and legal if not a necessary and unavoidable conclusion, the denial will not avail to disprove it.[1]

§ 164. **Admission and avoidance.**—It is an established rule of evidence in equity that, where an answer filed in a cause admits a fact and insists upon a distinct fact by way of avoidance, the fact admitted is established, but the fact insisted upon must be proved; otherwise the admission stands as if the fact in avoidance had not been averred.[2]

§ 165. **Avoiding discovery.** — An important question is frequently presented as to whether or not a defendant can defeat a discovery by pleading that the disclosure may subject him to a criminal prosecution. Such a plea has been held not sufficient to excuse a discovery,[3] while in many cases it is regarded as sufficient to excuse the party from answering.[4] This same question comes up in various forms in civil procedure, and, at least in the United States, the general rule and practice is that a party may omit to verify a pleading, or decline to make a disclosure which will tend to degrade or criminate him.

§ 166. **Affirmative relief.**—No affirmative relief can ordinarily be accorded to the defendant unless it is claimed by cross petition, or as an affirmative defense; yet where such relief has been granted without objection in the court below, the decree will not always, for that reason, be reversed on appeal.[5] It may be here observed that under the practice in Alabama the fact that the debtor has other property which might be subjected to the payment of the judgment,

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[1] Sayre v. Fredericks, 16 N. J. Eq. 209; S. P. Cunningham v. Freeborn, 11 Wend. (N. Y.) 253.

[2] Clements v. Moore, 6 Wall. 315; Presley's Evidence, p. 13; Hart v. Ten Eyck, 2 Johns. Ch. (N. Y.) 62; Clarke v. White, 12 Pet. 190.

[3] Devoll v. Brownell, 5 Pick. (Mass.) 448; Bunn v. Bunn, 3 New Rep. 679. See Wich v. Parker, 22 Beav. 59. Compare Reg. v. Smith, 6 Cox C. C. 31. See § 161.

[4] Michael v. Gay, 1 Fost. & Fin. 409; Bay State Iron Co. v. Goodall, 39 N. H. 237; Horstman v. Kaufman, 97 Pa. St. 147.

[5] Kellogg v. Aherin, 48 Iowa 299.

is not available to a voluntary alienee unless presented by cross bill.[1] The homestead may be protected by cross bill.[2] As elsewhere shown the vendee, when deprived of the property, may obtain reimbursement for the amount actually advanced if no intentional wrong is shown. It is intimated in McLean v. Letchford,[3] that the court would not consider his claim to reimbursement in the absence of a cross bill, though it is conceded that reimbursement has been made, in a proper case, where no cross bill had been filed.[4]

§ 167. **Waiver of verification.**—The pleadings in the class of litigation under discussion are usually verified. Where code practice prevails, if a verified bill of complaint is filed, all subsequent pleadings must be under oath except demurrers, which, of course, only raise questions of law. Though the complainant waive an answer under oath from the defendant, yet the latter may nevertheless verify the pleading. So held in Clements v. Moore.[5] Swayne, J., said: "It was her right so to answer, and the complainants could not deprive her of it. Such is the settled rule of equity practice, where there is no regulation to the contrary." It is said that the practice of waiving an answer under oath originated in the State of New York, by virtue of a provision incorporated in the statute,[6] at the suggestion of Chancellor Walworth, and was intended to introduce a new principle into the system of equity pleading. It was designed to leave it optional with the complainant to com-

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[1] Leonard v. Forcheimer, 49 Ala. 145.

[2] Thomason v. Neeley, 50 Miss. 313.

[3] 60 Miss. 182.

[4] Compare Dunn v. Chambers, 4 Barb. (N. Y.) 381; Grant v. Lloyd, 20 Miss. 192; Alley v. Connell, 3 Head (Tenn.) 578. See § 51.

[5] 6 Wall. 314. The 41st Rule in Equity of the Supreme Court now provides: "If the complainant in his bill shall waive an answer under oath, or shall only require an answer with regard to certain specified interrogatories, the answer of the defendant, though under oath, except such part thereof as shall be directly responsive to such interrogatories, shall not be evidence in his favor, unless the cause be set down for hearing on bill and answer only,' etc.

[6] N. Y. R. S., p. 175, § 44.

pel a discovery in aid of the suit, or to waive the oath of the defendant if the complainant was unwilling to rely upon his honesty, and chose to establish his claim by other evidence.[1]

[1] See Armstrong v. Scott, 3 Greene (Ia.) 433; Burras v. Looker, 4 Paige (N. Y.) 227.

CHAPTER XI.

OF THE JUDGMENT OR DECREE.

§ 168. The judgment conclusive.
169. Judgment *res adjudicata* though the form of procedure be changed.
170. Judgment appointing receiver.
171. Judgment avoids sale only as to creditor—not absolutely.
172. Judgment transferring title.
173. No judgment in favor of unrepresented parties.
173*a*. Creditor suing in place of assignee.
174. Confession of judgment.
§ 175. Impounding proceeds of a fraudulent sale.
176. Accounting by fraudulent vendee to debtor.
177. } Personal judgment against
178. } fraudulent vendee.
179. Money judgment, when disallowed.
180. Personal judgment against wife.
181. Judgment must conform to relief demanded.
182. Must accord with complaint.
183. Contradictory verdicts.
183*a*. New trial.

§ 168. **The judgment conclusive.**—The form of the judgment or decree in suits to annul fraudulent transfers, or to reach equitable assets, and the rights secured by the adjudication, constitute important branches of our subject. The usual attributes attach to the judgment in this class of cases. It is regarded as an estoppel upon the parties as to the subject-matter investigated.[1] But the estoppel has no wider effect. Raymond v. Richmond[2] is an illustration of our meaning. There the action was instituted by an assignee against a sheriff and an execution creditor, for levying upon property which had theretofore been adjudged to belong to the assignee, in an action to which the assignee, the assignor, and the execution defendant were parties.

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[1] See *In re* Hussman, 2 N. B. R. 441; Downer v. Rowell, 25 Vt. 336; Raymond v. Richmond, 78 N. Y. 351; Bell v. Merrifield, 109 N. Y. 211.

[2] 78 N. Y. 351; second appeal, 88 N. Y. 671.

The court very properly held that as the creditor, under whose judgment and execution the seizure had been effected, was not a party to the prior litigation, the adjudication did not conclude him. Hence such creditor was entitled to show that the transfer made by the execution defendant, although the title had been adjudged to be in the assignee, was fraudulent in fact, and the seizure of the property by the creditor therefore justifiable. Manifestly a purchaser of a chattel mortgage is not concluded by a subsequent adjudication in an action against the mortgagor and mortgagee to which he was not a party, declaring the mortgage to be fraudulent.[1] And a decree between husband and wife, establishing in the wife's favor a resulting trust in the husband's lands, is not conclusive upon the husband's existing creditors.[2]

§ 169. **Judgment res adjudicata though the form of procedure be changed.**—Where creditors seek by bill in equity to subject a vested estate in remainder to their claims, and the courts decide against them, the question will be *res adjudicata* if the creditors afterward try to levy by execution on the same interest, when it has become an estate in possession by the death of the life tenant.[3]

§ 170. **Judgment appointing receiver.**—The particular form of a decree in a creditor's action to cancel a fraudulent conveyance is, in some instances, of vital importance to the complainant. A court of equity undoubtedly possesses the power to pronounce a judgment annulling and clearing away the fraudulent obstruction, and then, by acting upon the person of the debtor, to compel him to convey the title to a receiver.[4] The practitioner, however, should be cau-

[1] Zoeller v. Riley, 100 N. Y. 102.

[2] Old Folks' Society v. Millard, 86 Tenn. 657; Humes v. Scruggs, 94 U. S. 22; Branch Bank of Montgomery v. Hodges, 12 Ala. 118.

[3] Nichols v. Levy, 5 Wall. 433.

[4] Chautauque County Bank v. Risley, 19 N. Y. 374; Cole v. Tyler, 65 N. Y. 77. Compare McLean v. Cary, 88 N. Y. 391; White's Bank of Buffalo v. Farthing, 9 Civ. Pro. (N. Y.) 66; s. c. 101 N. Y. 344; New York Life Ins. Co. v. Mayer, 19 Abb. N. C. (N. Y.) 92.

tious about entering up such a judgment, as the title which the receiver or a purchaser from him acquires rests upon the debtor's own conveyance, and has no relation to the original judgment which is the foundation of the bill in equity. It has been intimated that when the creditor pursues this course he abandons the lien of his judgment and seeks satisfaction of his debt out of the debtor's property generally. In Chautauque County Bank v. Risley,[1] the creditor's action was founded upon the first judgment recovered against the debtor, and the property was, under the order of the court, conveyed by the debtor to a receiver. It was decided that another creditor, whose judgment was subsequent to that which was the foundation of the creditors' bill, but which was entered prior to the time the bill was filed, might sell the real estate on execution, and the purchaser at such sale would acquire a better title than the grantee from the receiver. The creditor should therefore be careful not to sacrifice the advantage which the prior judgment gives him, and, having cleared the fraudulent conveyance out of the way, should, especially if subsequent judgments have been entered, proceed by execution and sale on his first judgment.[2] In Cole v. Tyler[3] the judgment set aside the conveyance and merely directed that the receiver should sell, execute deeds, etc. It is not easy to discover the theory upon which the receiver could be said to have acquired the title. The improper form of the judgment was assigned as a ground for its reversal, but the court said that if the direction to sell, etc., was erroneous, the error would not be rectified by an appeal, but the correct procedure was by motion to correct the judgment, the matter being one merely of detail, and not affecting the decision upon its merits.

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[1] 19 N. Y. 374.

[2] Compare White's Bank of Buffalo v. Farthing, 101 N. Y. 344; Shand v. Hanley, 71 N. Y. 319; Union Nat. Bank v. Warner, 12 Hun (N. Y.) 309; Cole v. Tyler, 65 N. Y. 73.

[3] 65 N. Y. 77.

§ 171. **Judgment avoids sale only as to creditor—not absolutely.**—The principle must always be kept in view, that a fraudulent sale is good between the parties. Giving effect to this doctrine generally controls the form of the judgment in a creditors' action. Thus in Orr v. Gilmore,[1] the conveyance was found to be voidable as against the creditor, but the court decided that the only judgment to which the complainant was entitled was a decree for the sale of the lot in suit and the payment of the amount of the claim with interest and costs. The sale being valid between the debtor and the fraudulent vendee, there was nothing to warrant a judgment declaring it null and void as to every one. In the case cited the judgment which was held by the higher court to be erroneous declared that the property belonged to the debtor. This was manifestly wrong, for, where it does not appear that there are other creditors, the judgment, whether it directs a sale on execution by the sheriff,[2] or by a receiver,[3] should only declare the conveyance void as to the plaintiff's judgment, and direct a sale for the payment of that alone. The grantee is entitled to all that might remain of the proceeds in the shape of surplus,[4] and, when the creditor is paid, the decree cancelling the conveyance is satisfied.[5] "The action of chancery," said Nelson, J., "upon the fraudulent grantor or assignee, is only to the extent of supplying a remedy to the suitor creditor; as to all other parties, the assignment remains as if no proceedings had been taken."[6] Under the Civil Code in Louisiana if the action is successful the judgment is that the conveyance be avoided as to its effect on the complaining creditors.[7]

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[1] 7 Lans. (N. Y.) 345; Duncan v. Custard, 24 W. Va. 731.

[2] Orr v. Gilmore, 7 Lans. (N. Y.) 345.

[3] Chautauque Co. Bank v. Risley, 19 N. Y. 369.

[4] Van Wyck v. Baker, 10 Hun (N. Y.) 40; Collinson v. Jackson, 8 Sawyer 365; *In re* Estes, 6 Sawyer 460.

[5] Rawson v. Fox, 65 Ill. 202. See Bostwick v. Menck, 40 N. Y. 383; Kerr v. Hutchins, 46 Tex. 384.

[6] McCalmont v. Lawrence, 1 Blatchf. 235.

[7] Claflin v. Lisso, 27 Fed. Rep. 420.

§ 172. **Judgment transferring title.**—The court has no power to effect a transfer of title to land by ordering a sale of it, except in special cases authorized by statute, such as mortgage and partition sales, sales of infants' lands, ordinary execution sales, and the like. In suits brought to reach lands conveyed with intent to defraud creditors, the proper decree, in New York at least, is to set aside the fraudulent conveyance, and permit the creditor to issue an execution and sell under it, or compel the debtor to convey to a receiver and direct the latter to sell. It was said by Gilbert, J., in Van Wyck v. Baker,[1] that "the fraudulent deed being annulled, the title remains in the debtor, and can be passed only by her deed."[2] If, however, the receiver is directed to sell without obtaining a prior conveyance from the debtor the erroneous judgment is not, as we have seen,[3] to be rectified by an appeal from the judgment, but a motion should be made to correct it.[4] Where an execution purchaser seeks to cancel a cloud on his title, of course no conveyance is requisite, as the plaintiff will be left in the full enjoyment of the title acquired by the sheriff's deed.[5]

§ 173. **No judgment in favor of unrepresented parties.**—In a case before the Supreme Court of California[6] it was said to be an anomaly in practice to render judgment in favor of a party who was not before the court, and was not rep-

[1] 10 Hun (N. Y.) 40.

[2] Citing Jackson v. Edwards, 7 Paige (N. Y.) 404; Chautauque Co. Bank v. White, 6 N. Y. 236; Chautauque Co. Bank v. Risley, 19 N. Y. 369. See Dawley v. Brown, 65 Barb. (N. Y.) 107.

[3] See § 170.

[4] Cole v. Tyler, 65 N. Y. 77.

[5] Hager v. Shindler, 29 Cal. 69. It is said in Ames v. Gilmore, 59 Mo. 541, that courts of chancery may, in suits to annul a fraudulent deed, not only divest the title of a fraudulent grantee, but the decree may proceed to vest the title in the plaintiff. See Kinealy v. Macklin, 2 Mo. App. 241; Apperson v. Burgett, 33 Ark. 328. The logical theory upon which this procedure is founded is not easily discovered. In the absence of statutory authority how can a court become possessed of any title which it can confer or bestow upon the creditor? Its province is to clear incumbrances from titles, or to coerce transfers.

[6] Bachman v. Sepulveda, 39 Cal. 688.

resented in any manner in the action. This observation was made in an action brought by a creditor against a fraudulent grantee to set aside a conveyance made by a deceased debtor, the ground of relief assigned being that the conveyance was made to hinder and delay creditors. The representative of the deceased debtor was not a party. The court very properly decided that it was error to render a judgment declaring a trust against the fraudulent grantee and in favor of the unrepresented estate of the grantor.

§ 173*a*. **Creditor suing in place of assignee.**—If an assignee refuses in a proper case to institute proceedings to get possession of the assigned property, the creditors collectively, or one suing in the right of all who may join in the action, may compel the execution of the trust in equity, or cause the removal of the assignee and the appointment of another. It seems, however, that in either case a decree for a single debt would be erroneous; the decree must follow the assignment, and the fruits of a recovery must be distributed according to its terms.[1]

§ 174. **Confession of judgment.**—A transfer of property by a person heavily indebted, made by means of a confession of judgment and sale on execution, was adjudged void in Metropolitan Bank v. Durant,[2] upon proof that it was intended to defraud creditors, and that the purchaser had knowledge of the facts. Collusive judgments, as we have seen,[3] are always open to the attack of creditors. A judgment entered by confession upon an insufficient statement of facts is effectual and binding between the parties, and a sale of property under it is legal and valid against all the world except existing creditors having a lien upon the property.[4]

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[1] Crouse v. Frothingham, 97 N. Y. 105. Compare Bate v. Graham, 11 N. Y. 237; Everingham v. Vanderbilt, 12 Hun (N. Y.) 75.

[2] 22 N. J. Eq. 35.

[3] See § 74, and note.

[4] Miller v. Earle, 24 N. Y. 112. Compare Marrin v. Marrin, 27 Hun (N. Y.) 602; Dunham v. Waterman, 17 N. Y. 9; Mitchell v. Van Buren, 27 N. Y. 300.

§ 175. **Impounding proceeds of a fraudulent sale.**—While it may be true that the money received by a fraudulent vendee from the sale of the property is not legally a debt due by the vendee to the fraudulent vendor, because the court will not assist to enforce or render effectual the fraud, yet in the intention of the parties it is a debt, and creditors may treat it as such and attach or reach it by judicial process.[1] The beneficent and remedial provisions of the statute 13 Eliz. would be of little avail if a fraudulent grantee could pass the property over to a mere volunteer without notice of the fraud, and upon that ground claim that the property or its proceeds were safe from the pursuit of creditors.[2]

§ 176. **Accounting by fraudulent vendee to debtor.**—Though a party may have intended to defraud the creditors of a debtor by taking and converting his property into cash, such intent is rendered harmless by his delivering the proceeds of the sale to the debtor or his authorized agent. If the party has accounted to the debtor for the proceeds of the property before proceedings are taken against him by the creditor, he cannot be forced to account for it over again.[3] The creditor must show that something

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[1] Heath v. Page, 63 Pa. St. 124; French v. Breidelman, 2 Grant (Pa.) 319; Mitchell v. Stiles, 13 Pa. St. 306.

[2] "Where a transfer of property is made, which is held void under the provisions of the bankruptcy act, as against the assignee in bankruptcy, the transferee is properly to be regarded as a trustee for the plaintiff, and to be held to account as such, especially where, as in this case, it appears that some, if not all, of the property, has passed away from the transferee." Schrenkeisen v. Miller, 9 Ben. 65.

[3] Cramer v. Blood, 57 Barb. (N. Y.) 163, affi'd 48 N. Y. 684; Murphy v. Briggs, 89 N. Y. 446. See Cramer v. Blood, 57 Barb. (N. Y.) 671; Clements v. Moore, 6 Wall. 299; Davis v. Graves, 29 Barb. (N. Y.) 480. In Greenwood v. Marvin, 111 N. Y. 434, the New York Court of Appeals said: "The equitable rights of the parties were to remain the same; the legal owner was to account to the other party for the net profits of the business, and no other mode of division is suggested than that of equality. If, therefore, that agreement effected any change in the relations of the parties, it operated as a temporary expedient to bridge over the period of Le Grand Marvin's pecuniary embarrassment, presumably with a view of restoring the original

remains which ought to be applied on the judgment. Where a third person has in good faith received a conveyance of the property in trust for an alleged fraudulent grantee, and has subsequently conveyed it to such grantee pursuant to the trust, it has been held that such third person is not a proper defendant in a creditor's action, simply because no cause of action exists against him.[1] The trustee under an assignment of lands which is declared fraudulent at the suit of a creditor, cannot be compelled to account for the rents received and applied according to the provisions of the trust, before the commencement of the action.[2]

§ 177. **Personal judgment against fraudulent vendee.**—The right of a judgment-creditor to a personal or money judgment against a fraudulent vendee of his debtor[3] comes up

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relations of the parties at some future time when it would be safe to do so. If that agreement was executed, as seems very probable, with a view of hindering and delaying the creditors of Le Grand, it was still competent for the parties, in the absence of interference by creditors, to rescind it at any time, and restore to each other an equal legal interest in the property acquired under such agreement."

[1] Spicer v. Hunter, 14 Abb. Pr. (N. Y.) 4.

Relief at law and in equity.—In Clements v. Moore, 6 Wall. 312, the court said: "When the fact of fraud is established in a suit at law, the buyer loses the property without reference to the amount or application of what he has paid, and he can have no relief either at law or in equity. When the proceeding is in chancery, the jurisdiction exercised is more flexible and tolerant. The equity appealed to—while it scans the transaction with the severest scrutiny—looks at all the facts, and giving to each one its due weight, deals with the subject before it according to its own ideas of right and justice. In some instances it visits the buyer with the same consequences which would have followed in an action at law. In others it allows a security to stand for the amount advanced upon it. In others it compels the buyer to account only for the difference between the under price which he paid and the value of the property. In others, although he may have paid the full value, and the property may have passed beyond the reach of the process of the court, it regards him as a trustee, and charges him accordingly. Where he has honestly applied the property to the liabilities of the seller, it may hold him excused from further responsibility."

[2] Collumb v. Read, 24 N. Y. 505. See § 26. As to when a judgment against an assignee cancelling an assignment as fraudulent is a final judgment, and how the same should be entered and enforced, see Myers v. Becker, 95 N. Y. 486.

[3] See § 62.

frequently for adjudication, and is discussed in many of the authorities. In the recent case of Ferguson v. Hillman,[1] in the Supreme Court of Wisconsin, the conveyances and mortgages had been adjudged fraudulent as to creditors, and knowledge of the fraud had been fastened upon the grantee. The familiar principle elsewhere discussed to the effect that a fraudulent grantee in possession of the property of the debtor cannot be protected, as against the creditors of the debtor, even to the extent of the money or other consideration given for the transfer, was invoked and applied.[2] The court observed that it seemed to follow as a necessary consequence that a fraudulent grantee could not be protected in the possession of the proceeds of such property received by him upon effecting a sale of it. The property in the hands of a fraudulent purchaser is held by him in trust for the creditors of the fraudulent vendor, and when the property is converted into money the fund thus created is impressed with the same trust. Were the rule otherwise, the grantee might defeat the creditor's claim by fraudulently changing the character of the property. In equity such money in the hands of the fraudulent grantee is a fund held for the benefit of the creditors of the grantor; and while such creditors may not be able to maintain an action at law for money had and received for their use, because they were never the owners of, or had title to the property which had been converted into money, yet a court of equity, having all the interested parties before it, possessed the power to direct such application of it as would be just. The court further held that if, in a proper case, equity had the power to order the fraudulent grantee to pay or apply the money received by him in satisfaction of

[1] 55 Wis. 190. See Mason v. Pierron, 69 Wis. 585.

[2] Gardinier v. Otis, 13 Wis. 460; Stein v. Hermann, 23 Wis. 132; Avery v. Johann, 27 Wis. 246; Union Nat. Bank v. Warner, 12 Hun (N. Y.) 306; Briggs v. Merrill, 58 Barb. (N. Y.) 389; Fullerton v. Viall, 42 How. Pr. (N. Y.) 294.

the debt of a creditor, then the fact that it directed a personal judgment to be rendered against him for the money so received, and that the amount be collected on execution, was merely a matter of form, which did not prejudice his rights, and of which he could not complain. Fullerton v. Viall[1] is an authority in point in this discussion. This important case, which certainly embodies features of vital interest to creditors and vendees whose good faith is questioned, seems to have been affirmed both at the general term of the Supreme Court and in the Court of Appeals of New York, without any written opinion having been given. The published report of the case was prepared by one of the counsel. The facts were briefly as follows: The defendant had taken from a debtor a conveyance of real estate, subject to a mortgage of $800, agreeing to pay $1,000 in addition. The sum of $500 was paid to the debtor in cash, and $500 by cancelling a debt due from the debtor to the grantee. Before the creditor's suit was instituted the grantee had sold the real estate to a *bona fide* purchaser, and realized from such sale the sum of $2,270. The court found that the conveyance was made in fraud of the grantor's creditors, and that the creditors were entitled to judgment against the fraudulent grantee for the value of the premises over and above the prior valid incumbrances. The recovery was not limited to the amount received by the fraudulent grantee on the sale, but his liability was held to extend to the value of the property fraudulently received by him, and which he had put beyond the reach of the creditors of his fraudulent grantor, subject, as already stated, to the prior valid incumbrances. The grantee must have found in this case that the way of the transgressor was hard, for he was neither allowed credit for his own debt which constituted part of the consideration, nor for the $500 paid to his grantor in cash.[2]

[1] 42 How. Pr. (N. Y.) 294.

[2] See Union Nat. Bank v. Warner, 12 Hun 306–308; Ferguson v. Hillman, 55 Wis. 192.

§ 178. — Murtha v. Curley [1] apparently puts this question of the creditors' right to a personal judgment against the fraudulent vendee at rest in New York. The vendee had foreclosed a fictitious chattel mortgage upon the property of the debtor, and had converted the proceeds which exceeded the creditors' claim to his own use. A money judgment was directed against the vendee for the amount of the plaintiffs' claim. The court held that this did not stamp the action as being legal rather than equitable, and that the judgment was proper in form. Earl, J., said: "A court of equity adapts its relief to the exigencies of the case in hand. It may restrain or compel the defendant; it may appoint a receiver, or order an accounting; it may compel specific performance, or order the delivery to the plaintiff of specific real or personal property; or it may order a sum of money to be paid to the plaintiff, and give him a personal judgment therefor." Where the property has been converted there is nothing to be sold, and no occasion for a receiver and no special need to state an account.[2] In Williamson v. Williams,[3] the fraudulent vendee had sold the land to a *bona fide* purchaser, and it was said that having deprived the creditor of the property, and obtained its price, he must be held responsible by reason of this fraudulent disposition of the property to the amount of the consideration received by him. The money stood for the land in his hands.[4]

[1] 90 N. Y. 372; S. C. 12 Abb. N. C. (N. Y.) 12, and notes; S. P. Warner v. Blakeman, 4 Abb. Ct. App. Dec. (N. Y.) 530. In Solinsky v. Lincoln Savings Bank, 85 Tenn. 372, the court say: "When a fraudulent vendee has so concealed or disposed of the property that creditors cannot reach or identify it, the creditor may, in equity at least, recover the proceeds or value thereof." Compare Eads v. Mason, 16 Bradw. (Ill.) 545.

[2] See also Gillett v. Bate, 86 N. Y. 87; S. C. 10 Abb. N. C. (N. Y.) 88; Steere v. Hoagland, 50 Ill. 377; Quinby v. Strauss, 90 N. Y. 664.

[3] 11 Lea (Tenn.) 370.

[4] In Wheeler v. Wallace, 53 Mich. 355, it was held that creditors levying upon property fraudulently transferred had no right to take from the transferee the increase if they had allowed it to accumulate for a long time under his management before attacking the transaction.

§ 179. **Money judgment, when disallowed.**—McLean v. Cary,[1] in the New York Court of Appeals, is a peculiar case in which a money judgment was denied. Plaintiff was a judgment-creditor. It was proved substantially that the debtor Greene sold to the other defendants certain machinery with an agreement that $12,000 of the consideration was to be paid in steam power. At a time when $9,000 remained unpaid a settlement was effected practically on the basis of a balance of $4,000. The court avoided the settlement as being fraudulent against the creditor, and the question as to the authority to render a money judgment against the defendants was presented. The complaint, it may be observed, prayed that the settlement be set aside as fraudulent, that a receiver be appointed, and that the creditor be paid out of the moneys realized by the receiver. No money judgment was demanded, and the court held that under the circumstances none was authorized, as the contract was payable *in steam power* and not in money. Under the practice in Illinois it seems to be implied that a personal or money judgment is improper in an action to annul a fraudulent transfer. In Patterson v. McKinney[2] this objection was taken, but the court said that as the cause was to be remanded it could be obviated by making an alternative decree providing that if the judgment was not paid within a time to be limited, the land should be sold on execution. In Dunphy v. Kleinsmith,[3] which was a creditors' suit against a fraudulent vendee, a judgment for damages was held to be improper; the correct relief was said to be by decree for an account.[4]

§ 180. **Personal judgment against wife.**—Where property is conveyed to a wife in fraud of her husband's creditors, it seems that a judgment *in personam* for its value cannot be taken against the wife, nor in case of her death, against her

[1] 88 N. Y. 391.
[2] 97 Ill. 52.
[3] 11 Wall. 615.
[4] See § 51.

executors.[1] Miller, J., said: "While the books of reports are full of cases in which real or personal property conveyed to the wife in fraud of the husband's creditors has been pursued and subjected to the payment of his debts after it had been identified in her hands, or in the hands of voluntary grantees or purchasers with notice, we are not aware of any well-considered case of high authority where the pursuit of the property has been abandoned, and a judgment *in personam* for its value taken against the wife. Certainly no such doctrine is sanctioned by the common law; and, though the present suit is a bill in chancery, the decree in this case is nothing more than a judgment at law, and could as well have been maintained in a separate suit at law for the money as in this suit. And the liability of the executors of the wife to this personal judgment must depend on the same principle as if, abandoning the pursuit of the *res*, the assignee had brought an action at law for the money." The modifications in the law peculiar to the relationship of husband and wife with reference to their property are so many and important that it would be impracticable to attempt to formulate rules intended for general application to the subject. These Supreme Court cases certainly accomplish an unfortunate result, and probably will not be universally accepted, if, indeed, the principles they embody are not superseded in some States by the removal of the disabilities incident to coverture. In Post v. Stiger[2] it appeared that property had been conveyed to a wife in fraud of the husband's creditors. The wife set up as a defense the fact that she had disposed of it. The court said that she must answer for its value. An attempt was made to show that she had subsequently lost by bad bargains all the property that she had acquired by the conveyance. The proofs did not seem to sustain this view,

[1] Phipps v. Sedgwick, 95 U. S. 9; followed, Trust Co. v. Sedgwick, 97 U. S. 304; Huntington v. Saunders, 120 U. S. 78.

[2] 29 N. J. Eq. 558.

but the court remarked that even if it had been so proved this would not relieve her from liability, and continuing said: "She held the property as trustee of her husband's creditors, and dealt with it at her peril. A fraudulent grantee cannot repel the claims of the creditors of the grantor, by simply saying: 'I have lost, by imprudent bargains or collusive foreclosures, the property I attempted to conceal, and, therefore, I am answerable for nothing.'" It may be urged that this case is a *dictum* on the point cited. This is probably a legitimate criticism, for the court practically found that the wife still had the property; yet as an expression of opinion of a highly intelligent court pointing, as we claim, in the right direction, we regard the *dictum* as worthy of adoption as an absolute authority.

§ 181. **Judgment must conform to relief demanded.**—As a general rule, the judgment must harmonize with the demand for relief.[1] In Curtis v. Fox[2] the plaintiff failed to establish that the conveyance by the debtor to his wife was fraudulent, and the complaint was consequently dismissed. It appeared that the wife died pending the action, and the creditor contended that the debtor defendant thereupon acquired a legal interest in her real estate, and that, instead of dismissing the complaint, a judgment should have been rendered providing for the sale of such interest, and an application of the proceeds to the satisfaction of the creditor's judgment. Cases like the Bank of Utica v. The City of Utica,[3] and Cumming v. The Mayor of Brooklyn,[4] were cited, in which it was held that, where both parties agree to submit the case to the jurisdiction of chancery, or the defendant omits to raise the objection by plea or in his answer, the court will retain jurisdiction and determine the case, although the plaintiff may have an adequate remedy at law. But the court held that the principle of these cases had no

[1] Dunphy v. Kleinsmith, 11 Wall. 615.
[2] 47 N. Y. 299.
[3] 4 Paige (N. Y.) 399.
[4] 11 Paige (N. Y.) 596.

application to the case of Curtis v. Fox above cited, because in that case Fox had no legal interest in the land, and did not acquire any until long after putting in his answer. The complaint did not allege any such interest, but sought relief solely upon the ground that the title of the wife was fraudulent as against the plaintiff, and this was the matter litigated. As the husband had no opportunity to raise the objection that a sale on execution was the proper remedy of the plaintiff, so far as the interest acquired upon the death of his wife was concerned, his silence did not waive it.

§ 182. **Must accord with complaint.**—It has been held in New York to be no ground of reversal of a judgment that the relief it extended was not prayed for in the complaint, provided it was such a decree as the plaintiff was entitled to upon the evidence.[1] While the effect of an erroneous prayer in a complaint can ordinarily be overcome, yet the general rule is that the allegations of the complaint must support the judgment. Thus, it was said by the Supreme Court of California, that a judgment which was not supported by the pleadings was as fatally defective as one which was not sustained by the verdict or finding. The judgment must accord with and be warranted by the pleadings of the party in whose favor it is rendered.[2] This may be true under the liberal interpretation of the statutes regulating the reformed procedure, but it is unwise for a complainant to place strong reliance upon such a rule of practice. On the contrary the bill should shadow forth the case which the evidence is calculated to disclose, or the variance may prove fatal. Thus, where the bill impeached a deed, and prayed its avoidance upon allegations of actual fraud, there is authority that, where the defendant is brought into court to answer such a charge, and so effect-

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[1] Buswell v. Lincks, 8 Daly (N. Y.) 518.

[2] Bachman v. Sepulveda, 39 Cal. 689; Bailey v. Ryder, 10 N. Y. 363.

ually repels it that the court would not be justified in holding that the averment was proved, the complainant is not at liberty to change his ground, and obtain other relief, based upon proof of constructive fraud, or other equities supposed to be established by the evidence.[1] And, where a bill charges actual and intentional fraud, and the prayer for relief proceeds upon that theory, the complainant cannot, under the prayer for general relief, rely upon circumstances which make out a case for relief under a distinct head of equity, although such circumstances substantially appear in the bill, but are charged only in aid of the actual fraud alleged.[2]

§ 183. **Contradictory verdicts.**—In Love v. Geyer,[3] which was an action brought by a judgment-creditor of the grantor, against the grantor and grantee, to avoid a fraudulent conveyance, a general verdict was returned against both defendants. A new trial was awarded to the grantor and denied to the grantee, and the case was continued without judgment. At a subsequent term the cause was tried by the court as to the grantor, and a finding and judgment rendered in his favor. The court, over the objection of the grantee, rendered judgment against him, upon the former verdict of the jury setting aside the conveyance as fraudulent. On review, the judgment was very correctly held to be erroneous.[4] Clearly, if no fraud had been practiced by the grantor, it was an absurdity to find that, as to the grantee, the conveyance was fraudulent. Both parties must necessarily be implicated in the fraud.

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[1] Clark v. Krause, 2 Mackey (D. C.) 574. "If a bill charges fraud as a ground of relief, fraud must be proved. The proof of other facts, though such as would be sufficient, under some circumstances, to constitute a claim for relief under another head of equity, will not prevent the bill from being dismissed." See, also, Fisher v. Boody, 1 Curt. C. C. 206.

[2] Eyre v. Potter, 15 How. 42.

[3] 74 Ind. 12.

[4] See Romine v. Romine, 59 Ind. 346; also Hollingsworth v. Crawford, 60 Ind. 70.

§ 183*a*. **New trial.**—The statutes granting statutory new trials as matter of right are not applicable to suits brought to annul fraudulent conveyances.[1]

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[1] See Somerville v. Donaldson, 26 Minn. 75; Shumway v. Shumway, 1 Lans. (N. Y.) 474, affi'd 42 N. Y. 143; Perry v. Ensley, 10 Ind. 378; Sedg. & Wait on Trial of Title to Land, 2d ed., § 595.

CHAPTER XII.

PROVISIONAL RELIEF—INJUNCTION—RECEIVER—ARREST.

§ 184. Provisional relief.
185. Injunction, when allowed.
186. When injunction refused.
187. Receiver in contests over real property.
188. Receivers of various interests.
189. Title on death of receiver.
190. Removal and dismissal of receiver.
191. Arrest of defendant.

§ 184. **Provisional relief.**—In view of the class of debtors and alleged purchasers with whom creditors are called upon to litigate, it is perhaps needless to recall the great importance of prompt and efficient provisional remedies easily accessible to complainants. The defendants may be contemplating flight, or may be engaged in wasting or converting the property with a view of thwarting the creditors' proceedings. The relief afforded by final decree will perhaps come too late to be practically effectual. In some instances an order of arrest may be procured against the person of the debtor, or of his co-conspirators; in others an injunction may issue restraining any misuse, incumbrance, or disposition of the property claimed to have been covinously alienated; while in others a receiver may be appointed to take possession and care of the property pending the litigation.[1] Indeed, the appointment of a receiver in a creditors' suit is almost a matter of course.[2] A receiver may even be appointed before answer filed in an urgent case,[3] or before judgment,[4] but only when it is manifest

[1] Ellett v. Newman, 92 N. C. 523.

[2] Bloodgood v. Clark, 4 Paige (N. Y.) 577; Fitzburgh v. Everingham, 6 Paige (N. Y.) 29; Runals v. Harding, 83 Ill. 75; Shainwald v. Lewis, 6 Fed. Rep. 776.

[3] Weis v. Goetter, 72 Ala. 259; Micou v. Moses, 72 Ala. 439.

[4] Cohen v. Meyers, 42 Ga. 46.

that the fund is in danger of being lost.[1] The receivership will be denied when it does not distinctly appear that there is any property to be preserved.[2]

§ 185. **Injunction, when allowed.**—As has been elsewhere shown, the courts will not ordinarily interfere by injunction or otherwise, at the instance of a contract-creditor, to restrain the debtor's control over his business, or any disposition of his property.[3] Hyde v. Ellery[4] is an exception to the usual rule, additional to those heretofore noticed.[5] It appeared in that case that the debtor had, by fraudulent means, purchased a large quantity of goods from various merchants, upon credit, and had sold the goods at auction so that it was practically impossible to trace them. An injunction was allowed in favor of simple contract-creditors, upon the theory that its issuance would prevent a multiplicity of suits, and furthermore, because, as the relief sought was to set aside a transaction entered into with the intention to defraud creditors, an injunction was necessary as ancillary to that relief. In another case which arose in Pennsylvania it was decided that a fraudulent severance of fixtures, made with a design to defeat the lien of a judgment, could be restrained in equity.[6]

In suits to annul fraudulent transfers, relief by injunction is often indispensable. Thus, where the petition alleged that an action was pending by plaintiff against one of the defendants, in which certain real estate, which had previously been fraudulently conveyed to another defendant, was attached, and the defendants were about to dispose of such real estate for the purpose of defeating plaintiff's claim, it was decided that a temporary injunction restraining such

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[1] Rheinstein v. Bixby, 92 N. C. 307.

[2] First National Bank v. Gage, 79 Ill. 207.

[3] Uhl v. Dillon, 10 Md. 500; McGoldrick v. Slevin, 43 Ind. 522; Dodge v. Pyrolusite Manganese Co., 69 Ga. 665; Johnson v. Farnum, 56 Ga. 144; Adee v. Bigler, 81 N. Y. 349; May v. Greenhill, 80 Ind. 124. See § 52.

[4] 18 Md. 501.

[5] See § 53.

[6] Witmer's Appeal, 45 Pa. St. 455.

sale was properly continued to the final hearing, notwithstanding the filing of an answer denying all fraudulent intent.[1] In a case in which the bill charged that the defendant, who was a trustee under an assignment for creditors, was a notoriously bad character, and had refused to allow an inventory of the assigned property to be made, and hence, if loss resulted, the creditors would be unable to show the extent of it, the court held that it was justified in granting an injunction and appointing a receiver without notice.[2] And where a suit was brought by creditors of a deceased debtor to reach property fraudulently alienated by him in his lifetime, it was decided that pending the suit the court properly enjoined the defendant from incumbering or conveying the land.[3] So an injunction may issue to stay waste.[4] It may be observed that a denial in the defendant's answer that he has any property does not constitute a cause for dissolving an injunction restraining him from assigning or disposing of his property.[5]

§ 186. **When injunction refused.**—An injunction will not be issued unless facts are shown from which its issuance appears to be a necessity in order to save the creditor's rights, and to prevent the wasting of the subject-matter of which he is in pursuit. Thus, in Portland Building Association v. Creamer,[6] it appeared that a creditor's bill was filed to set aside as fraudulent a conveyance of lands about one-half of which was woodland. The court held that an injunction which restrained the grantee from cutting and removing the timber from the premises would not be continued, it being shown that the value of the land, without the timber, was ample to satisfy the creditor's claim in case the conveyance should ultimately be annulled.

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[1] Joseph v. McGill, 52 Iowa 127.

[2] Rosenberg v. Moore, 11 Md. 376. See Blondheim v. Moore, 11 Md. 365.

[3] Appeal of Fowler, 87 Pa. St. 449.

[4] Tessier v. Wyse, 3 Bland's Ch. (Md.) 29.

[5] New v. Bame, 10 Paige (N. Y.) 502.

[6] 34 N. J. Eq. 107.

§ 187. **Receiver in contests over real property.**—Where real property is fraudulently transferred, the court, as we have seen, may adjudge and direct a transfer to a receiver.[1] Vause v. Woods[2] is an illustration of the disinclination of the court to interfere by the appointment of a receiver of real property, where the party in possession has what purports to be the legal title. The case came up on appeal from an order appointing a receiver upon a creditor's bill to take possession of the property alleged to have been conveyed in fraud of the plaintiff. Simrall, J., said (p. 128): "As against the legal title, the interposition is with reluctance; it will only be done in case of fraud clearly proved, and danger to the property."[3] Provisional relief is not encouraged in land cases because the subject-matter of contention is immovable, practically indestructible, and unlike personalty cannot be spirited away.[4] In New York a receiver will not be appointed in ejectment before judgment.[5] This practice has been a subject of criticism.[6] The rule is otherwise in an equitable action to annul a conveyance of real property, even though it is conceded that ejectment could have been brought in the place of the equitable action;[7] but even in such cases the relief is not easily secured.[8]

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[1] Cole v. Tyler, 65 N. Y. 77; McCaffrey v. Hickey, 66 Barb. (N. Y.) 489, 492; Chautauque County Bank v. Risley, 19 N. Y. 369; White's Bank of Buffalo v. Farthing, 9 Civ. Pro. (N. Y.) 66; s. c. 101 N. Y. 344. See § 170.

[2] 46 Miss. 120.

[3] Compare Lloyd v. Passingham, 16 Ves. Jr. 68; Mays v. Rose, Freem. Ch. (Miss.) 718; Jones v. Pugh, 8 Ves. 71; Walker v. Denne, 2 Ves. Jr. 170; Mapes v. Scott, 4 Brad. (Ill.) 268; Sedg. & Wait on Trial of Title to Land, Chapter XXIII.; Rheinstein v. Bixby, 92 N. C. 307; Beach on Receivers, § 67.

[4] Sedg. & Wait on Trial of Title, § 631.

[5] Guernsey v. Powers, 9 Hun (N. Y.) 78; Burdell v. Burdell, 54 How. Pr. (N. Y.) 91; Thompson v. Sherrard, 35 Barb. (N. Y.) 593; Sedg. & Wait on Trial of Title (2d ed.), § 615.

[6] Sedg. & Wait on Trial of Title (2d ed.), § 632.

[7] Mitchell v. Barnes, 22 Hun (N. Y.) 194. See the dissenting opinion of Learned, P. J., in this case. The suit was instituted to annul a deed upon the

[8] McCool v. McNamara, 19 Abb. N. C. (N. Y.) 344.

§ 188. **Receivers of various interests.**—On supplementary proceedings under the Wisconsin Code to enforce a decree for alimony, the court may appoint a receiver to take possession of the effects of the defendant in the divorce proceedings; the sheriff's return of the execution is sufficient ground therefor, and the receiver thus appointed may attack a fraudulent conveyance of the debtor's real estate made with intent to defeat the decree for alimony.[1] A receiver has been appointed of crops growing on a plantation;[2] and in a case where an annuity, which was charged upon real property, was in arrear,[3] and also of a living.[4]

§ 189. **Title on death of receiver.**—Where a receiver of a debtor's property has been appointed, and the debtor has executed the usual assignment of the property to him, upon the death of the receiver the title to the property vests in the court. The receiver's possession is the court's possession, and he is merely its agent or representative. The functions of the receiver continue after the death of the appointee, and it is competent for the court to appoint a successor to conduct and complete the litigation, and in other respects fulfil the duties which the first receiver left incomplete.[5] Nor is it necessary that the defendants in the

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ground that the grantor was insane, and the conveyance was procured by improper influences. The same relief could have been procured in ejectment. Van Deusen v. Sweet, 51 N. Y. 378. Hence, as a receiver could not be had in ejectment it was argued, in this dissenting opinion, that, by analogy, none should be appointed in the suit in equity. The majority of the court declined to adopt this view. A receiver is frequently appointed in suits to foreclose mortgages, when it appears that the security is insufficient and the mortgagor is insolvent. See Haas v. Chicago Building Society, 1 Am. Insolv. Rep. 201; Myers v. Estell, 48 Miss. 372; Hyman v. Kelly, 1 Nev. 179. Sea Ins. Co. v. Stebbins, 8 Paige (N. Y.) 565; Cheever v. Rutland & B. R. R. Co., 39 Vt. 654; Brown v. Chase, Walker's Ch. (Mich.) 43; Finch v. Houghton, 19 Wis. 150; Callanan v. Shaw, 19 Iowa 183. And a receiver may be had in an action to foreclose a contract for the sale of land. Smith v. Kelley, 31 Hun (N. Y.) 387.

[1] Barker v. Dayton, 29 Wis. 367.

[2] Micou v. Moses, 72 Ala. 439.

[3] Sankey v. O'Maley, 2 Moll. 491.

[4] Hawkins v. Gathercole, 31 Eng. L. & Eq. 305; Beach on Receivers, § 619.

[5] Nicoll v. Boyd, 90 N. Y. 519.

suits should be given notice of proceedings for the appointment of a successor to the first receiver.[1]

§ 190. **Removal and dismissal of receiver.**—"The jurisdiction of a court of equity," says Mr. High,[2] "which is exercised in the removal of receivers, bears a striking resemblance to that which is called into action upon the dissolution of an interlocutory injunction, and in both cases the power to terminate seems to flow naturally and as a necessary sequence from the power to create. And as an interlocutory injunction is usually dissolved upon the coming in of defendant's answer, denying under oath the allegations of the bill,[3] so in the case of a receivership, if the answer under oath fully and satisfactorily denies the equities of the bill, or the material allegations upon which the appointment was made, and these allegations are not sustained by any testimony in the case, the order of appointment will be reversed and the receiver removed."[4] It is said that the high prerogative act of taking property out of the hands of a party and putting it in pound ought not to be exercised except to prevent manifest wrong imminently impending. And when the court, upon the coming in of the answer, discovers that the danger is not imminent, and that there is no pressing necessity for the order, it may be revoked or modified on such terms as the court thinks wise.[5] We may here state that it is not a sufficient cause for removing a receiver of a judgment-debtor that he has employed the debtor as an agent to assist in collecting the assets, the receiver

[1] Nicoll v. Boyd, 90 N. Y. 519. See also Atty.-Genl. v. Day, 2 Madd. 246.

[2] High on Receivers, § 826.

[3] Citing Hollister v. Barkley, 9 N. H. 230; Armstrong v. Sanford, 7 Minn. 49; Anderson v. Reed, 11 Iowa 177; Stevens v. Myers, 11 Iowa 183; Taylor v. Dickinson, 15 Iowa 483; Hatch v. Daniels, 5 N. J. Eq. 14; Washer v. Brown, 5 N. J. Eq. 81; Suffern v. Butler, 18 N. J. Eq. 220; Parkinson v. Trousdale, 4 Ill. 367; Roberts v. Anderson, 2 Johns. Ch. (N. Y.) 202; Harris v. Sangston, 4 Md. Ch. Dec. 394; Kaighn v. Fuller, 14 N. J. Eq 419; Schoeffler v. Schwarting, 17 Wis. 30.

[4] Citing Voshell v. Hynson, 26 Md. 83; Drury v. Roberts, 2 Md. Ch. Dec. 157.

[5] Crawford v. Ross, 39 Ga. 49.

being solvent and the trust otherwise properly executed.[1] In many cases the debtor's knowledge of the business peculiarly qualifies him to render valuable services to the receiver. And the receiver should be served with notice and a specification of the grounds upon which the removal is sought.[2] It may also be observed that where the order appointing a receiver was fraudulently procured, and was subsequently annulled, the receiver will be required to account for the fund intact, and will not be allowed any deductions.[3]

§ 191. **Arrest of defendant.**—In New York, to authorize the arrest of a defendant in an action for alleged fraudulent disposition of his property, actual intent to defraud must be clearly established.[4] Proof must be adduced of an actual and guilty intent to defraud creditors. A mere constructive fraud such as the law implies because an act is done in violation of the statute or of the rights of the creditors at common law, is not sufficient.[5] Hence an order of arrest against a partner who, with knowledge of the insolvency of the firm, paid individual debts with firm assets, was vacated.[6] Where there is no evidence of guilty knowledge, the debtor should not be subjected to arrest for acts of constructive fraud.[7] The *lex fori*, as we have seen,[8] governs in cases involving the question of the right of arrest.

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[1] Ross v. Bridge, 24 How. Pr. (N. Y.) 163.

[2] Bruns v. Stewart Mfg. Co., 31 Hun (N. Y.) 197.

[3] O'Mahoney v. Belmont, 37 N. Y. Super. Ct. 224.

[4] Hoyt v. Godfrey, 88 N. Y. 669.

[5] Sherill Roper Air Engine Co. v. Harwood, 30 Hun (N. Y.) 11. Compare Neal v. Clark, 95 U. S. 704.

[6] Compare Wilson v. Robertson, 21 N. Y. 587; Menagh v. Whitwell, 52 N. Y. 146.

[7] Sherill Roper Air Engine Co. v. Harwood, 30 Hun (N. Y.) 11. See People v. Kelly, 35 Barb. (N. Y.) 444.

[8] See § 64.

CHAPTER XIII.

REIMBURSEMENT AND SUBROGATION.

§ 192. Actual and constructive fraud—Security or reimbursement of purchaser.
193. No reimbursement at law.
§ 194. Void in part void *in toto*.
195. Subrogation of purchaser to creditors' lien.

"The law cares very little what a fraudulent party's loss may be, and exacts nothing for his sake."—Andrews, J., in *Guckenheimer* v. *Angevine*, 81 N. Y. 397.

§ 192. **Actual and constructive fraud—Security or reimbursement of purchaser.**—There is a plain and highly important distinction to be found in the authorities between actual and constructive fraud as affecting the question of repayment of the money actually advanced by a purchaser. If the transaction is fraudulent in fact it cannot stand even for the purpose of reimbursement or indemnity;[1] while if it is only constructively fraudulent,[2] it may be upheld in favor of the vendee to the extent of securing restitution of the amount of the actual consideration given or paid by him, and only the excess of the property will be subjected to the creditor's debt.[3] When the grantee purchases without actual notice of the fraud, but for a consideration which is so inadequate that it would be inequitable to allow the deed to stand as a conveyance, a court of equity may, upon appropriate allegations and proof, give it effect as a security for the consideration actually paid.[4] And in cases of mere

[1] Millington v. Hill, 47 Ark. 311; Davis v. Leopold, 87 N. Y. 620; Shepherd v. Woodfolk, 10 B. J. Lea (Tenn.) 598; Alley v. Connell, 3 Head (Tenn.) 582.

[2] Lobstein v. Lehn, 20 Bradw. (Ill.) 261.

[3] Wood v. Goff's Curator, 7 Bush (Ky.) 63; Short v. Tinsley, 1 Met. (Ky.) 398; Crawford v. Beard, 12 Ore. 458; Lobstein v. Lehn, 120 Ill. 555.

[4] Van Wyck v. Baker, 16 Hun (N. Y.) 171. See Clements v. Moore, 6 Wall. 312; McArthur v. Hoysradt, 11

suspicious circumstances as to the adequacy of the consideration and fairness of the transaction the court will not entirely annul the conveyance, but on the contrary will so frame its judgment as to protect the purchaser to the amount of the money advanced.[1] Again, where strangers to the fraud paid off valid incumbrances upon the property, they are held entitled to be reimbursed, and to be provided for in the decree, before the complainant's claim is satisfied.[2]

The rule is laid down by Chancellor Kent in the great and leading case of Boyd v. Dunlap,[3] that a deed, fraudulent in fact, will be declared absolutely void, and not permitted to stand as a security for any reimbursement or indemnity, and this principle is upheld and followed in many cases.[4] Thus in Shand v. Hanley,[5] the vendee was not allowed to absorb the value of the premises in a claim for improvements made after constructive notice to her of the insecurity of her title, and of the equitable lien of the creditor. In Briggs v. Merrill,[6] Johnson, J., said: A party bargaining with a debtor with fraudulent intent, "does it at the peril of having that which he receives taken from him

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Paige (N. Y.) 495. In Colgan v. Jones, 44 N. J. Eq. 274, it appeared that a debtor who had sustained personal injuries assigned his claim for $330 to his attorney, who recovered thereon a judgment of $4,000. It was decided that the assignment as to the excess beyond a reasonable compensation to the attorney for his services was voidable as to the debtor's antecedent creditors.

[1] United States v. Griswold, 8 Fed. Rep. 504, citing Boyd v. Dunlap, 1 Johns. Ch. (N. Y.) 478; Crockett v. Phinney, 33 Minn. 157. See Taylor v. Atwood, 47 Conn. 508; Oliver v. Moore, 26 Ohio St. 298; First Nat. Bank v. Bertschy, 52 Wis. 443; May on Fraudulent Conveyances, p. 235. In Borden v. Doughty, 42 N. J. Eq. 314, a wife was allowed to recover for improvements made in good faith where a deed to her was set aside as being in effect voluntary. See Rucker v. Abell, 8 B. Mon. (Ky.) 566; King v. Wilcox, 11 Paige (N. Y.) 589.

[2] Swan v. Smith, 57 Miss. 548. See Young v. Ward, 115 Ill. 264.

[3] 1 Johns. Ch. (N. Y.) 478.

[4] See Davis v. Leopold, 87 N. Y. 620; Union Nat. Bank v. Warner, 12 Hun (N. Y.) 306; Wood v. Hunt, 38 Barb. (N. Y.) 302; Briggs v. Merrill, 58 Barb. (N. Y.) 389; Alley v. Connell, 3 Head (Tenn.) 582; Shepherd v. Woodfolk, 10 B. J. Lea (Tenn.) 598; Millington v. Hill, 47 Ark. 311.

[5] 71 N. Y. 323.

[6] 58 Barb. (N. Y.) 389.

by the creditors of the debtor whom he is attempting to defraud, without having any remedy to recover what he parts with in carrying out the bargain." The learned judge adds: "The law will leave him in the snare his own devices have laid." The court, in Stovall v. Farmers' and Merchants' Bank,[1] said that there was no rule which gave a lien under a fraudulent contract. Every person who enters into a fraudulent scheme forfeits all right to protection at law or in equity. The law does not so far countenance fraudulent contracts as to protect the perpetrator to the extent of his investment. This would be holding out inducements to engage in schemes of fraud, as nothing could be lost by a failure to effectuate the entire plan. Judge Spencer said he presumed there was "no instance to be met with of any reimbursement or indemnity afforded by a court of chancery to a *particeps criminis* in a case of positive fraud."[2] And Judge Story remarked, in Bean v. Smith:[3] "I agree to the doctrine laid down by Chancellor Kent in Boyd v. Dunlap[4] and Sands v. Codwise,[5] that a deed fraudulent in fact is absolutely void, and is not permitted to stand as a security for any purpose of reimbursement or indemnity; but it is otherwise with a deed obtained under suspicious or inequitable circumstances, or which is only constructively fraudulent."[6] "The loss of the amount paid by a fraudulent grantee is the penalty that the law inflicts for the fraudulent transaction. To refund to such a grantee the amount he has paid would be to destroy the penalty."[7]

It may be here observed that there seems to be authority for the proposition that loss resulting from depreciation may be apportioned between the debtor and the grantee,

[1] 16 Miss. 316.

[2] Sands v. Codwise, 4 Johns. (N. Y.) 598. Compare note to Lore v. Dierkes, 16 Abb. N. C. (N. Y.) 47.

[3] 2 Mason 296.

[4] 1 Johns. Ch. (N. Y.) 478.

[5] 4 Johns. (N. Y.) 549.

[6] See Henderson v. Hunton, 26 Gratt. (Va.) 935; Coiron v. Millaudon, 19 How. 115.

[7] See Scivers v. Dickover, 101 Ind. 495, 498.

according to the sums respectively invested,[1] when the conveyance is attacked by creditors. Thus in Shaeffer v. Fithian,[2] an insolvent purchased real estate for his wife, taking the title in her name, and advancing $2,460 of the consideration, the wife paying the balance of $4,000. The court ordered a sale of the property, and directed that twenty-four-hundred-and-sixty sixty-four-hundred-and-sixtieths of the proceeds of sale be applied in payment of the complainant's debt. The court, after observing that they could see no error in this decree to the prejudice of the wife, said: "She might well have been regarded as the sole owner of the property, and the *quasi* debtor of her husband. As such, she would be bound to bear the whole loss arising from depreciation of the property. The court below seems, however, to have considered the husband's interest as a kind of resulting trust in the property, making him in equity a tenant in common. This was certainly the most favorable view in behalf of the wife that could have been taken of the case. It results in saddling the loss arising from depreciation *pro rata* upon both parties." The Supreme Court of Missouri say, in Allen v. Berry,[3] that there is no principle of equity which allows a fraudulent grantee to offset against the value of the property the amount he may have paid for it. "The fraud," observes Adams, J., "renders the deeds absolutely void as to creditors, and the plaintiff, who was a creditor, and as such became the purchaser, is entitled to recover the property and its rents, etc., as though no such fraudulent deeds ever had been made." Allowing the vendee to recover back the money would be in effect repaying him the amount which he expended in accomplishing the very thing which the law prohibits and condemns. As it was a wrong in him to obtain the title and the possession for a fraudulent purpose, it must be equally wrong to refund to him the price paid for it.[4]

[1] Shaeffer v. Fithian, 26 Ohio St. 282.
[2] 26 Ohio St. 282.
[3] 50 Mo. 91.
[4] McLean v. Letchford, 60 Miss. 18[illegible].

§ 193. **No reimbursement at law.**—While a court of equity, in setting aside a deed of a purchaser upon grounds other than those of positive fraud, annuls it upon terms, and requires a return of the purchase-money, or directs that the conveyance stand as a security for its repayment, this principle has no place as applied to an action at law. This constitutes one of the essential differences already discussed[1] between relief in equity and the judgment extended by a court of law. The latter court, as we have said, can hold no middle course. The entire claim of each party must rest and be determined at law upon the single point as to the validity of the deed; but it is the ordinary case in the former court to decree that a deed not absolutely void, yet, under the circumstances, inequitable as between the parties, may be set aside upon terms.[2]

[1] See Chapter III., §§ 51, 60; Foster v. Foster, 56 Vt. 540.

[2] Coiron v. Millaudon, 19 How. 115. See Clark v. Krause, 2 Mackey (D. C.) 574; Drury v. Cross, 7 Wall. 299; Worthington v. Bullitt, 6 Md. 172.

Flexible jurisdiction of equity.—In Clements v. Moore, 6 Wall. 312, a case which we have frequently quoted and cited, the court said: "A sale may be void for bad faith, though the buyer pays the full value of the property bought. This is the consequence, where his purpose is to aid the seller in perpetrating a fraud upon his creditors, and where he buys recklessly, with guilty knowledge. When the fact of fraud is established in a suit at law, the buyer loses the property without reference to the amount or application of what he has paid, and he can have no relief either at law or in equity. When the proceeding is in chancery, the jurisdiction exercised is more flexible and tolerant. The equity appealed to, while it scans the transaction with the severest scrutiny, looks at all the facts, and giving to each one its due weight, deals with the subject before it according to its own ideas of right and justice. In some instances, it visits the buyer with the same consequences which would have followed in an action at law. In others, it allows a security to stand for the amount advanced upon it. In others, it compels the buyer to account only for the difference between the under price which he paid and the value of the property. In others, although he may have paid the full value, and the property may have passed beyond the reach of the process of the court, it regards him as a trustee, and charges him accordingly. Where he has honestly applied the property to the liabilities of the seller, it may hold him excused from further responsibility. *The cardinal principle in all such cases is, that the property of the debtor shall not be diverted from the payment of his debts to the injury of his creditors, by means of the fraud.*" See Tompkins v. Sprout, 55 Cal. 36. A grantee may be allowed for improvements. King v. Wilcox, 11 Paige (N. Y.) 589; see Shand v. Hanley, 71

§ 194. **Void in part void in toto.**—We shall see presently, that, as a general rule, a transaction void in part for any cause is entirely void.[1] Russell v. Winne[2] is an illustration of our meaning. In that case the question presented was whether a mortgage which was fraudulent against creditors as to a part of the property mortgaged, could be upheld as to the residue. The court decided that as the mortgage was a single instrument, given to secure one debt, to render it valid it must have been given in good faith, for the honest purpose of securing the debt, and without any intent to hinder or defraud creditors. Grover, J., continuing, said: "This cannot be true when the object, in part, or as to part of the property, is to defraud creditors. This unlawful design vitiates the entire instrument. The unlawful design of the parties cannot be confined to one particular parcel of the property. Entire honesty and good faith is necessary to render it valid; and whenever it indisputably appears that one object was to defraud creditors to any extent, the entire instrument is, in judgment of law, void."

§ 195. **Subrogation of purchaser to creditors' lien.**—The doctrine of subrogation is founded upon principles of equity and benevolence, and it may be decreed where no contract or privity of any kind exists between the parties.[3] In Lidderdale v. Robinson,[4] Chief-Justice Marshall said: "Where a person has paid money for which others were responsible, the equitable claim which such payment gives him on those who were so responsible, shall be clothed with the legal garb with which the contract he has discharged was invested, and he shall be substituted, to every

N. Y. 319, and the amount of incumbrances satisfied by the vendee may be allowed. Potter v. Gracie, 58 Ala. 303. So when a conveyance is annulled a mortgage in favor of a trust may be validated. First Nat. Bank v. Cummins, 39 N. J. Eq. 577. Compare Murphy v. Briggs, 89 N. Y. 446.

[1] See *infra*, Void and Voidable Acts.

[2] 37 N. Y. 591, 596.

[3] Cottrell's Appeal, 23 Pa. St. 294.

[4] 2 Brock. 168.

equitable intent and purpose, in the place of the creditor whose claim he has discharged." It may be noted that the party seeking subrogation must come into court with clean hands.[1] This doctrine of subrogation is frequently invoked in cases where fraudulent conveyances are annulled. Thus, in Selleck v. Phelps,[2] it was said that a person who acquired the title to property under circumstances which enabled the creditors of the vendor to avoid the sale, whether he be a purchaser or a voluntary grantee, would, after the payment of the claims of attaching creditors, be subrogated to their rights so as to enable him to hold the property against subsequent attachments.[3] Where goods were fraudulently conveyed but promptly seized by the creditors and sold by them, it was held that the fraudulent vendee should not be charged a greater sum than was realized upon the sale, and that he was entitled to a lien upon the proceeds of sale for the amount of a *bona fide* debt paid by the debtor out of the price given by the vendee.[4] The right of subrogation was recognized in Cole v. Malcolm.[5] It appeared that one Crawford conveyed real estate to his wife with intent to defraud creditors. Subsequently his wife died intestate and her heirs assigned the property to the defendant. One of Crawford's creditors then entered a judgment against him, and subsequently secured a decree setting aside the conveyance. The defendant then tendered the judgment-creditor the amount due him and demanded an assignment of the judgment against Crawford. The court held that under such circumstances, upon

[1] Wilkinson v. Babbitt, 4 Dill. 207; Railroad Co. v. Soutter, 13 Wall. 517; Griffith v. Townley, 69 Mo. 13. The doctrine of equitable subrogation will not be applied to relieve a party from a loss occasioned by his own unlawful act. Guckenheimer v. Angevine, 81 N. Y. 394.

[2] 11 Wis. 380.

[3] See Sheldon on Subrogation, § 40. Compare Acker v. White, 25 Wend. (N. Y.) 614; Tompkins v. Sprout, 55 Cal. 31; Merrell v. Johnson, 96 Ill. 224.

[4] Flash v. Wilkerson, 20 Fed. Rep. 257. Compare note to Lore v. Dierkes, 16 Abb. N. C. (N. Y.) 47.

[5] 66 N. Y. 363; overruling the court below, 7 Hun (N. Y.) 31.

payment of the judgment which he was obliged to satisfy in order to save his land from sale, the principles of justice and equity required that he should be subrogated to all the rights and securities of the judgment-creditor, especially as the latter had, when his judgments were paid, secured everything to which he was entitled.[1] So then, again, the tendency of the court to prevent a merger where injustice would result, has been applied to cases of this character. Thus, in Crosby v. Taylor,[2] it appeared that a grantee of land held it by a deed which was fraudulent as against the grantor's creditors. By a subsequent deed the grantee secured from a prior mortgagee a deed of quitclaim of all the latter's interest in the premises containing this clause, "which said mortgage is hereby cancelled and discharged." The court held that the deed constituted an assignment of the mortgage and did not operate by way of merger of it as against the grantor's creditors.

A fraudulent vendee may create a valid lien upon the property in favor of a mortgagee in good faith.[3]

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[1] See Snelling v. McIntyre, 6 Abb. N. C. (N. Y.) 471. Compare Robinson v. Stewart, 10 N. Y. 190.

[2] 15 Gray (Mass.) 64.

[3] Murphy v. Briggs, 89 N. Y. 446; First National Bank of Clinton v. Cummins, 39 N. J. Eq. 577.

CHAPTER XIV.

INTENTION.

§ 196. What is intention?
197. Actual intent not decisive.
198. Fraud of agent binding upon principal.
199. Mutuality of participation in fraudulent intent.
200. Intent affecting voluntary alienations.
§ 201. Of intention where consideration is adequate.
202. Intention to defraud subsequent creditors.
203. When question of intent *res adjudicata*.
204. Intent a question for the jury.
205. Testifying as to intent.
206. Proving intent.

"Where there is an actual intent to defraud, no form in which the transaction is put can shield the property so transferred from the claims of creditors."—Chief Judge Ruger in *Billings* v. *Russell*, 101 N. Y. 226, 234.

§ 196. **What is intention?**—Further space cannot be devoted to the discussion of the practical details of procedure in creditors' suits and proceedings. Let us next direct attention to a more complete consideration of the general principles and theories of law which these various remedies are devised to render effectual. The rules of evidence, which, as will appear, constitute a most important branch of the subject, will then be noticed in a general way.

First, what is the fraudulent intent, under the statute of Elizabeth, which must ordinarily exist to enable a creditor to defeat the debtor's alienation?[1] Sutherland, J., in Babcock v. Eckler,[2] a case already cited, used these words: "Intent or intention is an emotion or operation of the mind, and can usually be shown only by acts or declarations; and as acts speak louder than words, if a party does an act which must defraud another, his declaring that he did not by the act intend to defraud is weighed down by

[1] Harman v. Hoskins, 56 Miss. 142.

[2] 24 N. Y. 632.

the evidence of his own act."[1] Fraud, it must be noted, does not consist in mere intention, but in intention acted out, or made effectual by hurtful acts,[2] in conduct that operates prejudicially upon the rights of others, and which was so intended.[3] A fraudulent purpose is an important element in the case, but it is not the only essential requisite; there must be superadded to it, besides the sale or transfer, actual fraud, hindrance, or delay resulting therefrom to the creditors.[4] While it may possibly be true that the impressions, emotions, or operations of the mind are never effaced, yet they can be reproduced only by the person whose mind gave them birth. Their true nature can only be determined or guessed at by other persons from the color of the outward acts which the emotions inspired. Hence the court, as we have shown, will not be concluded by the statement of the debtor's mental operations, for he is usually an interested party; nor will it accept his standard of morality as its test. In Potter v. McDowell[5] this language is used: "When a voluntary deed is made by a debtor in embarrassed circumstances, and a question arises as to its validity, in order to render the deed fraudulent in law as to existing creditors, it is not necessary to show that the debtor contemplated a frand in making it, or that it

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[1] See Newman v. Cordell, 43 Barb. (N. Y.) 456; Monteith v. Bax, 4 Neb. 171. See §§ 8, 9, 10.

[2] See § 13. Learned, P. J., said in Billings v. Billings, 31 Hun (N. Y.) 65, 69: "There must be not only the intent, but the intent must be so carried out that some creditors are actually hindered, delayed, or defrauded. . . . . A conveyance is made with fraudulent intent only as to those who are in fact defrauded." In People v. Cook, 8 N. Y. 67, 79, Willard, J., said: "Fraud can never, in judicial proceedings, be predicated of a mere emotion of the mind, disconnected from an act occasioning an injury to some one." See Masterton v. Beers, 1 Sweeny (N. Y.) 419.

[3] Bunn v. Ahl, 29 Pa. St. 390. Compare Smith v. Smith, 21 Pa. St. 370.

[4] Rice v. Perry, 61 Me. 150.

[5] 31 Mo. 69. See White v. McPheeters, 75 Mo. 294. In Wartman v. Wartman, Taney's Dec. 370, Chief-Justice Taney said: "As regards the question, whether a contempt has or has not been committed, it does not depend on the intention of the party, but upon the act he has done." See Cartwright's Case, 114 Mass. 239.

was an immoral or corrupt act. . . . . The law does not concern itself about the private or secret motives which may influence the debtor"; he may believe he had the right to make it, and that it was his duty to do it, yet if the deed is voluntary, and hinders and delays his creditors, it is fraudulent. It may be observed here that a conveyance is fraudulent if the grantor meant to hinder or defraud *any* of his creditors, and a charge conveying the idea that he must have meant to defraud *all* his creditors, is misleading.[1] Also that it is not necessary to show that the fraudulent intent constituted the sole purpose, but only that it constituted a part of the purpose and design with which the scheme was entered into; if it is a *part* of the scheme to hinder or delay creditors, the whole transaction is void.[2] "The intent is the essential and poisonous element in the transaction."[3] It must be borne in mind that an intent to hinder, delay, *or* defraud, is sufficient to avoid the sale;[4] it is not essential to show a union of these elements, though it must be conceded that it is not an easy task to distinguish between an intent to hinder and an intent to delay.[5]

§ 197. **Actual intent not decisive.**—The question of the donor's actual intent is not then necessarily decisive. A man may give his property to his wife or children in the belief that he has the right to do so, but if by so doing his existing creditors are hindered or delayed the conveyance will be set aside.[6] In Briggs v. Mitchell[7] the court said: "The property conveyed to the wife so far exceeds in value the amount of the money which it was conveyed to secure, it is of itself sufficient to authorize the holding that the

[1] Allen v. Kinyon, 41 Mich. 282.

[2] Manning v. Reilly, 16 Weekly Dig. (N. Y.) 230; Holt v. Creamer, 34 N. J. Eq. 187; Russell v. Winne, 37 N. Y. 596, and cases cited; Mead v. Combs, 19 N. J. Eq. 112.

[3] Moore v. Hinnant, 89 N. C. 455, 459; Worthy v. Brady, 91 N. C. 269.

[4] See § 11.

[5] Rupe v. Alkire, 77 Mo. 642. See Burgert v. Borchert, 59 Mo. 83.

[6] Winchester v. Charter, 97 Mass. 140; Potter v. McDowell, 31 Mo. 62; Patten v. Casey, 57 Mo. 118. See Chaps. V., VI.

[7] 60 Barb. (N. Y.) 316.

conveyance was fraudulent as against antecedent creditors, without the finding of *actual* or meditated fraud." In Lukins v. Aird,[1] Davis, J., said: "It is not important to inquire whether, as matter of fact, the defendants had a purpose to defraud the creditors of Aird, for the fraud in this case is an inference of law, on which the court is as much bound to pronounce the conveyance in question void as to creditors, as if the fraudulent intent were directly proved." "An act innocent in the intention may be so injurious in the consequences, that the law declares it to be a fraud and forbids it."[2] That the debtor made the conveyance to avoid the plaintiff's claim because he did not believe it to be just will not sustain the transfer.[3] This subject has already been discussed.[4]

§ 198. **Fraud of agent binding upon principal.**—Warner v. Warren[5] establishes the principle that actual fraudulent intent, sufficient to avoid a transfer, need not be personal to the debtor. In this case a husband obtained a power of attorney from his wife authorizing him to transact business as her agent. By means of false statements he established a fictitious credit for her, incurred liabilities in her name, and then induced the wife to make an assignment. The wife was a guileless, artless woman, who took no part in the business, and intended to commit no wrong, but was a mere passive instrument in the hands of her husband, by whom the frauds were perpetrated. In avoiding the assignment, in favor of an attaching-creditor, Grover, J., said that the husband's "objects became hers; his frauds were her frauds; and she is responsible therefor, however destitute of any knowledge thereof." This case is a valuable precedent, showing that intent may be established by im-

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[1] 6 Wall. 79.

[2] Kisterbock's Appeal, 51 Pa. St. 485. Compare Lawson v. Funk, 108 Ill. 507.

[3] Barrett v. Nealon, 119 Pa. St. 171.

[4] See §§ 8, 9, 10.

[5] 46 N. Y. 228.

plication or substitution, and that mental operation or emotion is not necessarily the test.[1]

§ 199. **Mutuality of participation in fraudulent intent.**—Generally speaking, to render a conveyance fraudulent and voidable as against creditors, there must have been mutuality of participation in the fraudulent intent, on the part of both the vendor and the purchaser.[2]

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[1] See § 8.

[2] Curtis v. Valiton, 3 Mont. 157; Mehlhop v. Pettibone, 54 Wis. 652; Hall v. Arnold, 15 Barb. (N. Y.) 600; Wilson v. Prewett, 3 Woods 635; Hopkins v. Langton, 30 Wis. 379; Steele v. Ward, 25 Iowa 535; Schroeder v. Walsh, 120 Ill. 403; Miller v. Byran, 3 Iowa 58; Chase v. Walters, 28 Iowa 460; Kittredge v. Sumner, 11 Pick. (Mass.) 50; McCormick v. Hyatt, 33 Ind. 546; Cooke v. Cooke, 43 Md. 522, 525; Fifield v. Gaston, 12 Iowa 218; Preston v. Turner, 36 Iowa 671; Drummond v. Couse, 39 Iowa 442; Kellogg v. Aherin, 48 Iowa 299; Rea v. Missouri, 17 Wall. 543; Leach v. Francis, 41 Vt. 670; Partelo v. Harris, 26 Conn. 480; Ewing v. Runkle, 20 Ill. 448; Violett v. Violett, 2 Dana (Ky.) 323; Foster v. Hall, 12 Pick. (Mass.) 89; Byrne v. Becker, 42 Mo. 264; Bancroft v. Blizzard, 13 Ohio 30; Splawn v. Martin, 17 Ark. 146; Governor v. Campbell, 17 Ala. 566; Ruhl v. Phillips, 48 N. Y. 125; Jaeger v. Kelley, 52 N. Y. 274; Clements v. Moore, 6 Wall. 312; Astor v. Wells, 4 Wheat. 466; Howe Machine Co. v. Claybourn, 6 Fed. Rep. 441.

No participation by infant in fraudulent intent.—The creditor is sometimes embarrassed or foiled by a conveyance to some person not *sui juris*, as for instance an infant. In Hamilton v. Cone, 99 Mass. 478, Gray, J., said: "The only case cited for the tenant which requires special consideration is that of Goodwin v. Hubbard, 15 Mass. 210. But in that case the person to whom the conveyance was made, as well as his subsequent grantee, the demandant, participated in the fraudulent intent of the debtor, who paid the purchase-money; and the decision by which this court, having then no jurisdiction in equity to redress fraud, held that a grantee who participated in the fraudulent intent could not maintain a writ of entry against a creditor who had taken the land on execution against the fraudulent debtor, cannot be extended to this case, in which the demandant at the time of the conveyance to him was an infant of less than a year old, and could not participate in the fraud, and there was no offer to show that the conveyance was without adequate consideration." Citing Howe v. Bishop, 3 Met. (Mass.) 30; Clark v. Chamberlain, 13 Allen (Mass.) 257. See Mathes v. Dobschuetz, 72 Ill. 438; Tenney v. Evans, 14 N. H. 343; s. c. 40 Am. Dec. 194. See, also, § 26. In Matthews v. Rice, 31 N. Y. 460, it is asserted that the fact that the plaintiff was an infant and purchased partly upon credit from a firm in apparently straitened pecuniary circumstances, did not render the sale void in law as against creditors. The court said: "The infancy of the plaintiff did not alter or affect the transaction, save as a circumstance bearing upon the question of fraud in fact. There is no legal bar to the right of an infant to pur-

In discussing this subject Chief-Justice Church used these words: "Nor is the vendor's fraudulent intent sufficient. The vendee must be also implicated."[1] So in another case it is asserted that in order to set aside, as fraudulent against creditors, a conveyance to one creditor, he must have participated in or have been cognizant of the grantor's unlawful motives when he accepted the conveyance.[2] In Prewit v. Wilson,[3] Field, J., observed: "When a deed is executed for a valuable and adequate consideration, without knowledge by the grantee of any fraudulent intent of the grantor, it will be upheld, however fraudulent his purpose. To vitiate the transfer in such case, the grantee also must be chargeable with knowledge of the intention of the grantor." It is even held in Dudley v. Danforth,[4] by the New York Commission of Appeals, that where a vendee purchased property solely with a view of receiving payment of an honest debt, an intent on the part of the debtor to hinder and defraud creditors would not affect the vendee's title, although the vendee had notice of the intent, provided he did not participate in it.[5] This would seem to justify action on the part of a creditor by

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chase property either for cash or upon credit; and the vendor cannot avoid or retract the sale, or question its validity on the ground that the vendee is an infant, much less can a stranger impeach the sale on that ground. In this, as in other cases of a sale of chattels, its invalidity as to creditors depends upon whether it was made with intent to defraud them." See Washband v. Washband, 27 Conn. 424; Carter v. Grimshaw, 49 N. H. 100.

[1] Jaeger v. Kelley, 52 N. Y. 275. See Starin v. Kelly, 88 N. Y. 421.

[2] Roe v. Moore, 35 N. J. Eq. 526.

[3] 103 U. S. 24.

[4] 61 N. Y. 626.

[5] Criticised in Roeber v. Bowe, 26 Hun (N. Y.) 557. The proposition embodied in Dudley v. Danforth may well be doubted. The general rule is that notice of the debtor's fraudulent design is fatal to the vendee's title. Atwood v. Impson, 20 N. J. Eq. 156.

Rules as to corporations.—The rules governing fraudulent transfers are also applicable to corporations. See Curtis v. Leavitt, 15 N. Y. 9. In Graham v. Railroad Co., 102 U. S. 161, Bradley, J., said: "We see no reason why the disposal by a corporation of any of its property should be questioned by subsequent creditors of the corporation, any more than a like disposal by an individual of his property should be so. The same principles of law apply to each."

means of which the debtor could be deluded and a preference gained by the creditor vendee.

§ 200. **Intent affecting voluntary alienations.**—The rule as to intent in voluntary alienation, as we shall presently see, necessarily differs from cases where a valuable consideration is present. In the latter class of cases mutual participation in the fraudulent design must of course be established. Where the alienation is voluntary the invalidity may be predicated of the fraudulent intent of the vendor without regard to the knowledge or motives of the vendee. In such cases the vendee is, of course, cognizant of the fact that nothing was paid for the property. The cases relating to this branch of the inquiry are reviewed by the Supreme Court of Maine in Laughton v. Harden,[1] an important case from which we have already quoted.[2] Judge Story thus

[1] 68 Me. 213. See Tucker v. Andrews, 13 Me. 124; Lee v. Figg, 37 Cal. 328; Watson v. Riskamire, 45 Iowa 233; Stearns v. Gage, 79 N. Y. 102.

[2] See §§ 97, 98.

The cases as to intent—Voluntary conveyances.—The court in Laughton v. Harden, 68 Me. 213, summarize the cases as follows: "In Hitchcock v. Kiely, 41 Conn. 611, it was decided that 'a voluntary conveyance, fraudulent in fact, will be set aside in favor of creditors, whether the grantee participated in the fraud or not.' In that case, the contending party was a creditor subsequent to the conveyance. In Beecher v. Clark, 12 Blatchf. 256, a voluntary conveyance was set aside for the benefit of both prior and subsequent creditors. Hunt, J., says: 'I cannot assent to the proposition, that it is necessary that the grantee should have known that the intent of the grantor was fraudulent, and that she should have been an intentional party to the fraud. The fact that a wife received a voluntary conveyance of the same, in ignorance of these facts (showing fraud in fact), will not make the conveyance a valid one.' Savage v. Murphy, 8 Bosw. (N. Y.) 75, contains a learned and lengthy review by Hoffman, J., of the earlier decisions by which subsequent purchasers and creditors were permitted to question conveyances as being fraudulent against them, and this proposition is there laid down: 'Where a deed is made to defraud creditors, by one at the time in debt, and who subsequently continued to be indebted, it is fraudulent and void, as to all such subsequent as well as existing creditors.' See also Carpenter v. Roe, 10 N. Y. 227. In Mohawk Bank v. Atwater, 2 Paige (N. Y.) 54, Chancellor Walworth says: 'It is of no consequence in this suit whether the son knew of the extent of his father's indebtedness or not. The grantee without valuable consideration cannot be protected, although he was not privy to the fraud.' In Carter v. Grimshaw, 49 N. H. 100, the intent of minor chil-

states the rule borrowed from the civil law by both the common law and the courts of chancery: "Hence, all voluntary dispositions, made by debtors, upon the score of liberality, were revocable, whether the donee knew of the prejudice intended to the creditors or not."[1]

§ 201. **Of intention where consideration is adequate.**—The rule that a voluntary conveyance of property by a debtor may be annulled at the suit of creditors, seems to commend itself as being both necessary and reasonable. The theory of the law is, as we have observed, that the debtor's property constitutes a fund upon which the creditors are supposed to have relied in extending the credit,[2] and to which they are entitled to resort for payment of their claims. The plainest dictates of common sense, and the simplest principles of justice require that any depletion of this fund should not be permitted in favor of a voluntary alienee, in cases where creditors remain unpaid. Chief-Justice Shaw

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dren upon whom a settlement was made was considered of no consequence at all. Coolidge v. Melvin, 42 N. H. 510, 534, sustains the same view. In Savage v. Murphy, 34 N. Y. 508, the same idea is strongly presented by the court. Among other things said about the rights of subsequent creditors against a voluntary deed, this is added: 'The indebtedness then existing was merely transferred, not paid, and the fraud is as palpable as it would be if the debts now unpaid were owing to the same creditors who held them at the time of the transfers.' In Clark v. Chamberlain, 13 Allen (Mass.) 257, 260, Hoar, J., remarks: 'Where the purpose of the grantor is shown to have been actually fraudulent as to creditors, it is sufficient to prove that the grantee takes without consideration, without proving otherwise his participation in the fraudulent intent.' Lee v. Figg, 37 Cal. 328, concludes an opinion thus: 'It (the allegation) avers that the conveyance to Ogden was without consideration, and this is sufficient to avoid it as to creditors of Lee (the grantor), whether Ogden was aware of the fraudulent purpose of Lee and actively aided it or not.' Lassiter v. Davis, 64 N. C. 498, decides that 'a voluntary gift is void, if it was the maker's intent to hinder, delay, or defraud creditors, whether the party who takes the gift participated in the fraudulent intent or not.' In Foley v. Bitter, 34 Md. 646, it was held to the same effect, and it is there said: 'The innocence of the trustee, or of the creditors named in the deed, will not save it (an assignment) from condemnation under the statute (of Elizabeth) if fraudulent in fact on the part of the grantor.'"

[1] Story's Eq. Jur. §§ 351, 353, 355; Spaulding v. Blythe, 73 Ind. 94.

[2] See Chap. II.

said: "In a voluntary absolute conveyance, the fact that no consideration is paid is, of course, known to both parties. If the grantor was in debt at the time, as such conveyance must necessarily tend to defeat the rights of creditors, and as all persons are presumed to contemplate and intend the natural and probable consequences of their own acts, the conclusion is irresistible that such conveyance was intended to defeat creditors, and is therefore fraudulent."[1] A different question, however, is presented where full pecuniary consideration has been paid by the purchaser. Can the transfer be nullified in such cases, and if so, in what instances and upon what theory? The answer is that, generally speaking, a debtor's conveyance can be set aside where it is made with a mutual fraudulent intent to hinder, delay, and defraud creditors, and that adequacy of consideration will not save it. In this class of cases "the question of intent becomes prominently material."[2] Lord Mansfield said, in discharging a rule for a new trial in Cadogan v. Kennett:[3] "If the transaction be not *bona fide*, the circumstance of its being done for a valuable consideration will not alone take it out of the statute. I have known several cases where persons have given a fair and full price for goods, and where the possession was actually changed, yet, being done for the purpose of defeating creditors, the transaction has been held fraudulent, and therefore void." The "several cases" of which this learned jurist had knowledge, where conveyances founded

[1] Marden v. Babcock, 2 Met. (Mass.) 104. See First Nat. Bank v. Bertschy, 52 Wis. 443.

[2] Bradley v. Ragsdale, 64 Ala. 559. "A sale of property, even for full value, in order to hinder or delay creditors, both vendor and vendee knowing the fraudulent purpose, cannot be upheld." Treat, J., in Stinson v. Hawkins, 4 McCrary 504. In Greenleve v. Blum, 59 Tex. 127, the court say: "A purchaser not a creditor who should buy the property of a debtor, however adequate might be the consideration which he paid, with a knowledge that it was the intention of the debtor by the sale to put the property beyond the reach of his creditors, would be a *mala fide* purchaser and entitled to no protection as against creditors."

[3] 2 Cowp. 434.

upon adequate consideration had been overturned by reason of the bad faith of the participants, have grown to thousands, and the subject has become one of vital interest and paramount importance. That a conveyance, whether it be of real or personal property, founded upon adequate consideration, may be vacated for fraud, is established in an endless variety of cases, a few only of which we will cite.[1] In Wadsworth v. Williams,[2] Hoar, J., in delivering the opinion of the Supreme Court of Massachusetts, said: "A conveyance made with an actual purpose and intent to defraud creditors, present or future, is not valid against them in favor of a grantee who participates in the fraudulent intention, although made for a full consideration, and by a grantor in the possession of any amount of property." The learned Chief-Justice Black observed: "If a debtor, with the purpose to cheat his creditors, converts his land into money, because money is more easily shuffled out of sight than land, he of course commits a gross fraud. If his object in making the sale is known to the purchaser, and he nevertheless aids and assists in executing it, his title is worthless, as against creditors, though he may have paid a full price. But the rule is different when property is taken for a debt. One creditor of a failing debtor is not bound to take care of another. It cannot be said that one is defrauded by the payment of another. In such cases, if the assets are not large enough to pay all, somebody must suffer. It is a race in which it is impossible for every one to be foremost."[3] It matters not what price was paid, or how early after the sale possession was changed, or how notorious the transaction was,

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[1] Brinks v. Heise, 84 Pa. St. 251; Ashmead v. Hean, 13 Pa. St. 584; Cox v. Miller, 54 Tex. 27; Stinson v. Hawkins, 13 Fed. Rep. 833; Hartshorn v. Eames, 31 Me. 93; Holbird v. Anderson, 5 T. R. 235; Pickstock v. Lyster, 3 M. & S. 371; Covanhovan v. Hart, 21 Pa. St. 500; Grover v. Wakeman, 11 Wend. (N. Y.) 192; Stone v. Spencer, 77 Mo. 359.

[2] 100 Mass. 130.

[3] Covanhovan v. Hart, 21 Pa. St. 500.

if the vendor made the sale in order to defraud his creditors, and the vendee purchased with the design to aid him in the perpetration of the fraud, the sale is no more valid or effectual against such creditors than as if no consideration had passed.[1] The right of a debtor, even in failing circumstances, to prefer a creditor,[2] or to sell and dispose of his property in good faith and for value, to whomsoever he wishes, is generally unquestioned in the courts.[3] Thus the intention to defeat an execution creditor will not render the sale fraudulent if it was made for a valuable consideration, and is *bona fide* and absolute.[4] So a confession of judgment with intent to give priority is valid.[5] The transfers which we have instanced as objectionable are those which are merely colorable, or in which some secret right, benefit, favor, or interest is reserved to the debtor, or some unusual incident attends the transaction, stamping it as being out of the ordinary course of business, and as having been contrived to hinder, delay, or defraud creditors. Payment of the consideration is often in such cases a part of the scheme to more completely cover and conceal the fraud. Hence it is said that it is not the consideration, but the intent with which a conveyance is made, that makes it good or bad as to creditors.[6]

In Jones v. Simpson [7] it was said that where bad faith in the vendor appeared the burden was cast upon the vendee to show consideration, and this being established the cred-

[1] Stone v. Spencer, 77 Mo. 359.

[2] Bostwick v. Burnett, 74 N. Y. 319; Hauselt v. Vilmar, 2 Abb. N. C. (N. Y.) 222; Gray v. McCallister, 50 Iowa 497.

[3] Hobbs v. Davis, 50 Ga. 214; Hall v. Arnold, 15 Barb. (N. Y.) 599.

[4] Wood v. Dixie, 7 Q. B. 892; Storey v. Agnew, 2 Bradw. (Ill.) 353; Wilson v. Pearson, 20 Ill. 81; Francis v. Rankin, 84 Ill. 169; Dudley v. Danforth, 61 N. Y. 626; Dalglish v. McCarthy, 19 Grant (Ont.) 578; Nimmo v. Kuykendall, 85 Ill. 476; Riches v. Evans, 9 C. & P. 640; Frazer v. Thatcher, 49 Texas 26; Clark v. Morrell, 21 U. C. Q. B. 600; Darvill v. Terry, 6 H. & N. 807.

[5] Beards v. Wheeler, 11 Hun (N. Y.) 539; Holbird v. Anderson, 5 T. R. 235. See § 11.

[6] Hunters v. Waite, 3 Gratt. (Va.) 26; Lockhard v. Beckley, 10 W. Va. 96.

[7] 116 U. S. 610.

itors must assume the burden of attacking the vendee's good faith. This seems to state the rule correctly, but general expressions to the effect that proof of bad faith in the vendor throws the burden of establishing both consideration *and* good faith upon the vendee are frequently encountered in the authorities.

§ 202. **Intention to defraud subsequent creditors.**—We have elsewhere seen that, generally speaking, a voluntary alienation is, as to existing creditors, presumptively fraudulent, but, as to subsequent creditors, a fraudulent intent must be proved or established.[1] While a conveyance made to defraud a subsequent judgment-creditor is within the statute,[2] it seems to be laid down in some of the cases that subsequent creditors can only avail themselves of the fraud which is practiced against them.[3] In Simmons v. Ingram[4] the court said: "To make a deed void as to subsequent creditors, there must be proof of an intent to defraud them; it is not sufficient that there is an intent to defraud others whose debts were in existence at the time."[5] In Florence Sewing Machine Company v. Zeigler,[6] it was held that in order to avoid a sale founded upon an adequate new consideration—that is, not in payment of an antecedent debt—on the alleged ground that it was made to hinder, delay, and defraud creditors, the creditor attacking the sale must show two things: first, that the vendor made the sale with such intent, and second, that the purchaser participated in such intent, or knew of its existence, or had knowledge of

[1] Rose v. Brown, 11 W. Va. 134; Shand v. Hanley, 71 N. Y. 319–322; Burdick v. Gill, 2 McCrary 488; Florence S. M. Co. v. Zeigler, 58 Ala. 224; Harlan v. Maglaughlin, 90 Pa. St. 293. See Mullen v. Wilson, 44 Pa. St. 416; Partridge v. Stokes, 66 Barb. (N. Y.) 586; Herring v. Richards, 1 McCrary 574; City Nat. Bank v. Hamilton, 34 N. J. Eq. 160. See Chapters V., VI.

[2] Hoffman v. Junk, 51 Wis. 614.

[3] Harlan v. Maglaughlin, 90 Pa. St. 293; Snyder v. Christ, 39 Pa. St. 499; Monroe v. Smith, 79 Pa. St. 459; Kimble v. Smith, 95 Pa. St. 69; Haak's Appeal, 100 Pa. St. 62.

[4] 60 Miss. 898.

[5] Citing Hilliard v. Cagle, 46 Miss. 309; Prestidge v. Cooper, 54 Miss. 74. Compare Teed v. Valentine, 65 N. Y. 474, and cases cited.

[6] 58 Ala. 224.

some fact calculated to put him on inquiry, and which if followed up would have led to the discovery that the vendor's intent was fraudulent.[1]

§ 203. When question of intent res adjudicata.—In Stockwell v. Silloway[2] the Supreme Court of Massachusetts said: "To prove the intent of the defendant in making the conveyances alleged to be fraudulent in the charges filed by the plaintiff, it was competent to show other fraudulent conveyances made about the same time, and as a part of the same scheme of fraud. For this purpose the plaintiff introduced the record of a judgment of the Superior Court rendered in proceedings between the same parties, under the provisions of the general statutes in relation to poor debtors, adjudging the defendant guilty of the charges therein alleged against him. The plaintiff asked the court to rule that this judgment was conclusive evidence that the conveyances set forth in the former case as fraudulent, and upon which the defendant was then convicted, were fraudulent, as alleged. We are of opinion that the court erred in refusing this ruling. When a fact has once been put in issue and determined by a final judgment in the course of a judicial proceeding, such judgment is conclusive evidence of the existence of the fact in all controversies between the same parties in which it is material. It is to be regarded as a fixed fact between the parties for all purposes."[3]

§ 204. Intent a question for the jury.—The question of fraudulent intent is almost uniformly one of fact[4] to be submitted to a jury,[5] and it is regarded as error for the court to interfere with the province of the jury in this particular,[6]

[1] Crawford v. Kirksey, 55 Ala. 282.

[2] 113 Mass. 385.

[3] See Burlen v. Shannon, 99 Mass. 200, and cases cited; Commonwealth v. Evans, 101 Mass. 25; Dennis' Case, 110 Mass. 18.

[4] Morgan v. Hecker, 74 Cal. 543.

[5] Weaver v. Owens, 16 Ore. 304.

[6] Peck v. Crouse, 46 Barb. (N. Y.) 151; Monteith v. Bax, 4 Neb. 171; Vance v. Phillips, 6 Hill (N. Y.) 433; Hobbs v. Davis, 50 Ga. 214; Murray v. Burtis, 15 Wend. (N. Y.) 214; Syracuse Chilled Plow Co. v. Wing, 85 N.

unless, as we have seen,[1] the fraud is apparent on the face of the instrument from a legal construction of it.[2] In determining the intent great latitude is allowed.[3] The rule as to submission to the jury is not departed from even in strong and apparently conclusive cases. If the jury err the verdict may be set aside. Thus, in Vance v. Phillips,[4] it appeared that an insolvent merchant sold his entire stock of goods to an infant, who was also his clerk and brother-in-law, taking the infant's note in payment, and then absconded. A verdict of a jury, affirming the validity of the transaction, was promptly set aside as contrary to evidence.[5] Especially will the verdict be overturned where it is apparent that the jury must have misapprehended the evidence.[6] By statute, in New York the question of fraudulent intent in these cases "shall be deemed a question of fact, and not of law,"[7] and it was strenuously claimed in behalf of the vendee, in the recent and well-considered case of Coleman v. Burr,[8] that there was no finding by the referee of a fraudulent intent; but that on the contrary he had found the whole transaction to be fair and honest, and that therefore the transaction should stand. The court say, however, that the referee has "found facts from which the inference of fraud is inevitable, and although he has characterized the transactions as honest and fair, that does not make them innocent, nor change their essential character in the eye of the law. Mr. Burr [the debtor] must be deemed to have intended the natural and inevitable consequences of his acts, and that was to hinder, delay, and defraud his credit-

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Y. 426; Van Bibber v. Mathis, 52 Tex. 409; Winchester v. Charter, 102 Mass. 272; Peiser v. Peticolas, 50 Tex. 638.

[1] See §§ 8, 9, 10.

[2] Van Bibber v. Mathis, 52 Tex. 409.

[3] Winchester v. Charter, 102 Mass. 276.

[4] 6 Hill (N. Y.) 426.

[5] See also Dodd v. McCraw, 8 Ark. 83; Potter v. Payne, 21 Conn. 362; Marston v. Vultee, 12 Abb. Pr. (N. Y.) 143.

[6] Edwards v. Currier, 43 Me. 474.

[7] 2 N. Y. R. S. 137, § 4.

[8] 93 N. Y. 31. See Neisler v. Harris, 115 Ind. 565.

ors."[1] This principle has already been discussed in the opening chapter,[2] but in view of the peculiar wording of the New York statute, it is deemed important to give the construction placed upon it by the court of final resort.[3]

§ 205. **Testifying as to intent.**—A party being a witness may testify as to his intention in performing an act where such intention becomes material.[4] The purchaser may, in answer to a question, testify directly that he did not have any fraudulent intent and that the purchase was made in good faith. That it is proper to put such a question to the purchaser was directly decided in the case of Bedell v. Chase,[5] though the contrary seems to be held in Minnesota.[6] In Blaut v. Gabler[7] this question was asked: "Had anything transpired between Blaut and yourself—conversation or otherwise—whereby you gave him to understand, or whereby it was understood, that the transaction was for an improper purpose, or the purpose of defrauding your creditors?" The court decided that the question was properly excluded upon the theory that it did not call for a statement of the witness as to his intent to defraud, but went far beyond this, and asked for a conclusion from what had transpired. The question was characterized as being indefinite and complicated, and as not coming within the rule which sanctions an inquiry as to the intent of a party. As a general rule, it is proper to allow the parties to testify concerning their intentions,[8] though this class of testimony

[1] Citing Bump on Fraud. Conv. (3d ed.) 22, 24, 272, 278; Cunningham v. Freeborn, 11 Wend. (N. Y.) 241; Edgell v. Hart, 9 N. Y. 213; Ford v. Williams, 24 N. Y. 359; Babcock v. Eckler, 24 N. Y. 623, 632.

[2] See §§ 9, 10.

[3] See, as to intent to violate usury statutes, Fiedler v. Darrin, 50 N. Y. 438.

[4] Graves v. Graves, 45 N. H. 323. See Hale v. Taylor, 45 N. H. 406; Royce v. Gazan, 76 Ga. 79; Sedgwick v. Tucker, 90 Ind. 281.

[5] 34 N. Y. 386; Starin v. Kelly, 88 N. Y. 422.

[6] Hathaway v. Brown, 18 Minn. 414.

[7] 77 N. Y. 465.

[8] Bedell v. Chase, 34 N. Y. 388; Griffin v. Marquardt, 21 N. Y. 121; Snow v. Paine, 114 Mass. 520; Thacher v. Phinney, 7 Allen (Mass.) 146; Sey-

is necessarily subjected to close scrutiny. When the circumstances present conclusive evidence of a fraudulent intent, no proof of innocent motives, however strong, will overcome the presumption; but where the facts do not necessarily prove fraud, but only tend to that conclusion, the evidence of the party who made the conveyance, when he is so circumstanced as to be a competent witness, should be received for what it may be considered worth.[1] It is believed, however, not to be proper to allow a witness to testify concerning the intent or motive of another person.[2]

§ 206. **Proving intent.**—In King v. Poole[3] the court said: "In investigating an alleged fraud, the relevancy of a given fact does not depend upon its force, but upon its bearing. Does it bear, either directly or indirectly, with any weight whatever, on the main controversy or any material part of it? Not only is fraud subtle, but that ingredient of a transaction which renders it fraudulent in fact, namely intention, is covered up in the breast, hidden away in the heart. Outward manifestations of it may be slow in appearing, and when they do appear, may be dim and indistinct. To interpret their meaning, or the full meaning of any one of them, it may be necessary to bring them together and contemplate them all in one view. To

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mour v. Wilson, 14 N. Y. 567. An accused person may testify as to his intention in receiving a certain sum of money. People v. Baker, 96 N. Y. 340.

[1] Seymour v. Wilson, 14 N. Y. 569, 570; S. P. Edwards v. Currier, 43 Me. 474; Forbes v. Waller, 25 N. Y. 430; Wheelden v. Wilson, 44 Me. 1; Miner v. Phillips, 42 Ill. 123.

[2] See Hathaway v. Brown, 22 Minn. 216; Peake v. Stout, 8 Ala. 647. "It is not competent for one person to state the motives influencing the conduct of another." Riley v. Mayor, etc. of N Y., 96 N. Y. 337. And it was said in the case last cited that: "Evidence of a secret and undisclosed intent, entertained by one party at the time of the making of a contract, either express or implied, is not admissible to vary the legal presumptions arising from the acts and conduct of the parties." Riley v. Mayor, etc. of N. Y., 96 N. Y. 339. See Talcott v. Hess, 31 Hun (N. Y.) 285.

[3] 61 Ga. 374. See Kempner v. Churchill, 8 Wall. 369.

do this, one has to be picked up here, another there, and so on till the collection is complete."[1] Great latitude is allowed.[2] On an inquiry as to the state of mind, sentiments, or disposition of a person at a particular period, his declarations and conversations are admissible.[3] In concluding this chapter we may recall to the reader's attention the rule that if a transaction is entered into for the purpose of defrauding any creditor it is voidable at the suit of all creditors.[4]

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[1] Burdick v. Gill, 7 Fed. Rep. 668.

[2] Winchester v. Charter, 102 Mass. 276; Rea v. Missouri, 17 Wall. 542.

[3] 1 Greenleaf's Ev. § 108; Tyler v. Angevine, 15 Blatch. 537; Baker v. Kelly, 41 Miss. 703.

[4] Allen v. Rundle, 50 Conn. 31. See Warner v. Percy, 22 Vt. 155.

CHAPTER XV.

CONSIDERATION.

§ 207. Concerning consideration and good faith.
208. Voluntary conveyances.
209. What is a valuable consideration?
210. Love and affection.
211. Transfer for grantor's benefit.
212. Ante-nuptial settlement—Marriage as consideration.
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§ 207. **Concerning consideration and good faith.**—Consideration has been said to consist "either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility, given, suffered, or undertaken by the other."[1] The subject cannot be here considered from an elementary point of view in all its ramifications, but its general bearing upon our particular topic will be briefly noticed. It will be found upon investigation that, generally speaking, the question of consideration becomes important in the class of litigation under discussion only in *bona fide* transactions. If the alienation is effected with a mutual design to hinder, delay, or defraud creditors, the presence of even the most bounteous or adequate consideration will not save or cure it.[2] Thus a mort-

[1] Currie v. Misa, L. R. 10 X. 162.

[2] See Chap. XIV. Billings v. Russell, 101 N. Y. 232; Boyd v. Turpin, 94 N. C. 137. In Bradley v. Ragsdale, 64 Ala. 559, the court say: "If the conveyance be upon a valuable consideration, then the question of intent becomes prominently material. The consideration may be paid in money—may be valuable and fully adequate, yet if it was made 'with intent to hinder, delay, or defraud creditors, purchasers, or

gage though given for a just debt may be assailed as fraudulent.[1] Unilateral evil intent will not, of course, suffice to overturn the transaction.[2] "*Mala fides*," says Mr. May, "supersedes all inquiry into the consideration, but *bona fides* alone is not always sufficient to support a transaction not founded on any valuable consideration."[3] The inadequacy of the consideration, as is elsewhere shown, is not a matter which the court will go into, except in so far as it may constitute evidence tending to show that the transaction was a sham;[4] and the law will not "weigh considerations in diamond scales."[5] Though grossly inadequate consideration will render a conveyance fraudulent,[6] the avoidance may be only to the extent of the inadequacy.[7] Generally speaking, as we have already seen, the question whether a conveyance is fraudulent or not depends upon its being made upon good consideration *and bona fide*. It is not sufficient that it be upon good consideration *or bona fide*; it must be both.[8] The separation of these elements is fatal to the transaction as against creditors.[9] This rule is concisely stated in a recent case of much importance in the United States Supreme Court. "It is not enough," says Woods, J., "in order to support a settlement against cred-

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other persons, of their lawful suits, damages, forfeitures, debts, or demands,' it is void, and stands for nothing." Citing Code of 1876, § 2124; Planters' & M. Bank v. Borland, 5 Ala. 531; Cummings v. McCullough, 5 Ala. 324; Hubbard v. Allen, 59 Ala. 283; Howell v. Mitchell, in manuscript.

[1] Billings v. Russell, 101 N. Y. 233; Syracuse Chilled Plow Co. v. Wing, 85 N. Y. 421, 426; Schmidt v. Opie, 33 N. J. Eq. 141; Blennerhassett v. Sherman, 105 U. S. 117.

[2] Prewit v. Wilson, 103 U. S. 24; Wood v. Stark, 1 Hawaiian Rep. 10; Herring v. Wickham, 29 Gratt. (Va.) 628. See Chap. XIV.

[3] May on Fraud. Conveyances, p. 233.

[4] Per Sir W. M. James in Bayspoole v. Collins, 18 W. R. 730.

[5] Per Lord Talbot, as quoted by Wilmot, C. J., in Roe v. Mitton, 2 Wils. 358 n.

[6] Singree v. Welch, 32 O. S. 320. See Rooker v. Rooker, 29 O. S. 1.

[7] Jamison v. McNally, 21 O. S. 295. See Black v. Kuhlman, 30 O. S. 196.

[8] Sayre v. Fredericks, 16 N. J. Eq. 209; Schmidt v. Opie, 33 N. J. Eq. 141; Billings v. Russell, 101 N. Y. 232, citing the text.

[9] See § 15.

itors, that it be made for a valuable consideration. It must be also *bona fide*. If it be made with intent to hinder, delay, or defraud them, it is void as against them, although there may be in the strictest sense a valuable or even an adequate consideration."[1] "Forms," said Elliott, J., in a very recent case, "are of little moment, for where fraud appears courts will drive through all matters of form and expose and punish the corrupt act. A conveyance is not protected, although full consideration is paid, where grantor and grantee unite in a fraudulent design to defraud creditors."[2]

§ 208. **Voluntary conveyances.**—It is perhaps unnecessary to observe that a voluntary conveyance "implies the total want of a substantial consideration,"[3] or "is a deed without any valuable consideration."[4] Such a transfer is more easily susceptible to attack than a conveyance founded upon an adequate consideration; for a transfer by a debtor without consideration, made for the purpose of defrauding his creditors, can be impeached by the creditors for fraud, even though the grantee was ignorant of the fraudulent purpose for which the covinous conveyance was given.[5] The *onus* of establishing a fraudulent intent is avoided. In Lee v. Figg[6] the court observed that whether the voluntary alienee participated in and aided the covinous intent or not was immaterial; "he was not a purchaser in good faith." The

[1] Blennerhassett v. Sherman, 105 U. S. 117. See Twyne's Case, 3 Rep. 80 (2 Coke 212); Holmes v. Penney, 3 Kay & J. 90; Gragg v. Martin, 12 Allen (Mass.) 498; Brady v. Briscoe, 2 J. J. Mar. (Ky.) 212; Bozman v. Draughan, 3 Stew. (Ala.) 243; Farmers' Bank v. Douglass, 19 Miss. 469; Bunn v. Ahl, 29 Pa. St. 387; Root v. Reynolds, 32 Vt. 139; Kempner v. Churchill, 8 Wall. 362; Kerr on Fraud & Mistake, p. 200.

[2] Buck v. Voreis, 89 Ind. 117; Billings v. Russell, 101 N. Y. 226.

[3] Washband v. Washband, 27 Conn. 431.

[4] Seward v. Jackson, 8 Cow. (N. Y.) 430.

[5] Lee v. Figg, 37 Cal. 328; Beecher v. Clark, 12 Blatchf. 256; Laughton v. Harden, 68 Me. 213; Mohawk Bank v. Atwater, 2 Paige (N.Y.) 54; Hitchcock v. Kiely, 41 Conn. 611; Carter v. Grimshaw, 49 N. H. 100. See Chap. XIV.

[6] 37 Cal. 336.

distinction may be restated as follows: A voluntary gift or settlement is voidable if it was the intent of the maker to hinder, delay, or defraud creditors, whether the party who received the gift participated in the fraudulent intent or not; an absolute conveyance for a valuable consideration is good, notwithstanding the intent of the maker to defraud, unless the other party participated in the fraud.[1] We have elsewhere shown that, in the majority of the cases, a voluntary alienation is regarded as presumptively fraudulent as to existing creditors,[2] while in other cases this presumption is conclusive.[3] Where, however, a corporation, or individual, perfectly solvent at the time, and having no actual intent to defraud creditors, disposes of lands or property for an inadequate consideration, or by a voluntary conveyance, subsequent creditors of the corporation cannot question the transaction.[4] If, as we have seen, it was made with the design to defraud subsequent creditors, this will render it fraudulent. It must be remembered, however, that in New York the question of fraudulent intent is in all cases to be deemed a question of fact, and not of law, and it is declared that no conveyance or charge shall be adjudged fraudulent as against creditors or purchasers solely on the ground that it was not founded on a valuable consideration.[5] It is not *per se* void even as to existing creditors.[6]

§ 209. **What is a valuable consideration?**—Much has been said concerning the true import of the expression "a valu-

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[1] Lassiter v. Davis, 64 N. C. 498.

[2] Lloyd v. Fulton, 91 U. S. 485; Holden v. Burnham, 63 N. Y. 74; Dunlap v. Hawkins, 59 N. Y. 342; Donnebaum v. Tinsley, 54 Tex. 365.

[3] City Nat. Bank v. Hamilton, 34 N. J. Eq. 160. Compare McCanless v. Flinchum, 89 N. C. 373.

[4] Graham v. Railroad Company, 102 U. S. 148. See Chap. VI.

[5] Babcock v. Eckler, 24 N. Y. 629; Dunlap v. Hawkins, 59 N. Y. 345; Dygert v. Remerschnider, 32 N. Y. 629. Compare Coleman v. Burr, 93 N. Y. 31; Genesee River Nat. Bank v. Mead, 92 N. Y. 637; Emmerich v. Hefferan, 21 J. & S. (N. Y.) 101; Jackson v. Badger, 109 N. Y. 632.

[6] Dygert v. Remerschnider, 32 N. Y. 629.

able consideration." Certainly a moneyed consideration for an assignment of goods greatly disproportionate to the value of the property transferred would not take a conveyance out of the statute against covinous alienations. The consideration must be adequate; not that the courts will weigh the value of the goods sold and the price received, in very nice scales, but after considering all the circumstances they will hold that there should be a reasonable and fair proportion between the price and the value. Cases in which the question of inadequacy of consideration arises between the grantor and grantee of a deed, where suit is instituted for the purpose of setting aside the grant on the ground of imposition, are not applicable in determining a question of the fairness of a consideration between a vendee and creditor under the statute concerning fraudulent conveyances. Such inadequacy of consideration as would induce a court to set aside a conveyance at the instance of the grantor on the ground of imposition, presents an entirely different question from that degree of inadequacy which would avoid an assignment on the ground of fraud, in a suit instituted by a creditor or purchaser against the alleged fraudulent assignee. A grantor must of necessity make out a stronger case, calling for the interference of the courts, than a creditor, because the latter is not a participant in the transaction, is guilty of no negligence or fraud, and belongs to a favored class. Unreasonable inadequacy of price is evidence of a secret trust, and it is said to be *prima facie* evidence that a conveyance is not *bona fide* if it is accompanied with any trust.[1] In Cook v. Tullis[2] the court observed that "a fair exchange of values may be made at any time, even if one of the parties to the transaction be insolvent."[3]

It is said in the New York Court of Appeals that a

[1] Kuykendall v. McDonald, 15 Mo. 420.

[2] 18 Wall. 340.

[3] See Stewart v. Platt, 101 U. S. 738.

valuable consideration is something mutually interchanged between the parties, and that it is not necessary that the subject-matters should be of equal values.[1] It is also established that a gratuity cannot be subsequently converted into a debt so as to become the consideration of a conveyance made by the grantor to the injury of his creditors.[2]

§ 210. **Love and affection.**—In Mathews v. Feaver[3] Sir Lloyd Kenyon said: "This is a transaction between the father and the son, and natural love and affection is mentioned as part of the consideration, upon which, as against creditors, I cannot rest at all. It is true it is a consideration which, though not valuable, is yet called meritorious, and which in many instances the court will maintain, but not against creditors." Natural love and affection is a sufficient consideration for a gift or voluntary transfer between a brother and a sister,[4] but as a general rule a conveyance for such a consideration cannot be supported against the rights of existing creditors.[5] It was said in Hinde's Lessee v. Longworth,[6] and the rule is still good, that "a deed from a parent to a child, for the consideration of love and affection, is not absolutely void as against creditors. It may be so under certain circumstances; but the mere fact of being in debt to a small amount would not make the deed fraudulent, if it could be shown that the grantor was in prosperous circumstances, and unembarrassed, and that the gift to the child was a reasonable provision according to his state and condition in life, and leaving enough for the payment of the debts of the grantor." The same principle appertains generally to conveyances founded upon such consideration.[7]

[1] Dygert v. Remerschnider, 32 N. Y. 642.

[2] Clay v. McCally, 4 Woods 605.

[3] 1 Cox Eq. Cas. 278, 280.

[4] Anderson v. Dunn, 19 Ark. 658.

[5] Moreland v. Atchison, 34 Tex. 351.

[6] 11 Wheat. 213.

[7] *Good and valuable consideration.*—Judge Story observes, 1 Story's Eq. Jur. § 354: "A good consideration is

§ 211. **Transfer for grantor's benefit.**—As was observed by Peck, J., in Stanley v. Robbins,[1] one cannot transfer his property "in consideration of an obligation for support for life, or perhaps for support for any considerable length of time, unless he retains so much as is necessary to satisfy existing debts."[2] In Crane v. Stickles[3] the court said: "It seems, that one week before the plaintiff's note fell due, they took a sweeping sale of all the property of which the defendant was possessed, real and personal, and obligated themselves that they would support her for the same, as the only consideration, paying nothing and agreeing to pay nothing, only by way of support—and leaving nothing for the payment of debts. Now if the law would tolerate a proceeding like this, any person, having the means, may make ample provision for himself and family during life, at the expense of his creditors. But that would not be permitted."

§ 212. **Ante-nuptial settlement—Marriage as consideration.**—An ante-nuptial settlement, though made by the in-

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sometimes used in the sense of a consideration which is valid in point of law; and then it includes a meritorious as well as a valuable consideration. Hodgson v. Butts, 3 Cranch 140; Copis v. Middleton, 2 Madd. 430; Twyne's Case, 3 Rep. 81 (2 Coke 212); Taylor v. Jones, 2 Atk. 601; Newland on Contracts, c. 23, p. 386; Partridge v. Gopp, Ambler 598, 599; S. C. 1 Eden 167, 168; Atherley on Mar. Sett. c. 13, pp. 191, 192. But it is more frequently used in a sense contradistinguished from valuable; and then it imports a consideration of blood or natural affection, as when a man grants an estate to a near relation, merely founded upon motives of generosity, prudence, and natural duty. A valuable consideration is such as money, marriage, or the like which the law esteems as an equivalent given for the grant, and it is therefore founded upon motives of justice. 2 Black. Com. 297; 1 Fonbl. Eq. B. 1, c. 4, § 12, note. Deeds made upon a good consideration only, are considered as merely voluntary; those made upon a valuable consideration are treated as compensatory. The words 'good consideration' in the statute, may be properly construed to include both descriptions; for it cannot be doubted that it meant to protect conveyances made *bona fide* and for a valuable consideration, as well as those made *bona fide* upon the consideration of blood or affection. Doe v. Routledge, Cowp. 708, 710, 711, 712; Copis v. Middleton, 2 Madd. 430; Hodgson v. Butts, 3 Cranch 140; Twyne's Case, 3 Rep. 81 (2 Coke 212)."

[1] 36 Vt. 432.

[2] See Crane v. Stickles, 15 Vt. 252; Briggs v. Beach, 18 Vt. 115; Woodward v. Wyman, 53 Vt. 647.

[3] 15 Vt. 257.

tended husband with the design of defrauding his creditors, will not be set aside in the absence of the clearest proof of the wife's participation in the fraud.[1] In Magniac v. Thompson the court said: "Nothing can be clearer, both upon principle and authority, than the doctrine that to make an ante-nuptial settlement void, as a fraud upon creditors, it is necessary that both parties should concur in, or have cognizance of, the intended fraud. If the settler alone intended a fraud, and the other party have no notice of it, but is innocent of it, she is not and cannot be affected by it. Marriage, in contemplation of the law, is not only a valuable consideration to support such a settlement, but is a consideration of the highest value, and from motives of the soundest policy is upheld with a steady resolution."[2] The courts are averse to annulling such a settlement, because there can follow no dissolution of the marriage which was the consideration for it.[3] The marriage subsists in full force even though one of the parties should forever be rendered incapable of performing his or her part of the marital contract.[4]

Marriage is not only a valuable consideration, but, as Coke says, there is no other consideration so much respected in the law.[5] The wife is deemed to be a purchaser of the property settled upon her in consideration of the marriage, and she is entitled to hold it against all claimants.[6] In Sterry v. Arden[7] Chancellor Kent observed:

[1] Prewit v. Wilson, 103 U. S. 22. See § 199.

[2] 7 Pet. 348, 393; approved and adopted in Prewit v. Wilson, 103 U. S. 22, 24; Frank's Appeal, 59 Pa. St. 194; Wright v. Wright, 59 Barb. (N. Y.) 505, affi'd 54 N. Y. 437; Comer v. Allen, 72 Ga. 12.

[3] Prewit v. Wilson, 103 U. S. 22; Barrow v. Barrow, 2 Dick. 504; Nairn v. Prowse, 6 Ves. 752; Campion v. Cotton, 17 Ves. 264; Sterry v. Arden, 1 Johns. Ch. (N. Y.) 261; Herring v. Wickham, 29 Gratt. (Va.) 628; Andrews v. Jones, 10 Ala. 400.

[4] Herring v. Wickham, 29 Gratt. (Va.) 635.

[5] See Bishop's Law of Married Women, 775, 776; Magniac v. Thompson, 7 Peters 348.

[6] Herring v. Wickham, 29 Gratt. (Va.) 628.

[7] 1 Johns. Ch. (N. Y.) 260-271; affirmed Verplank v. Sterry, 12 Johns. (N. Y.) 536.

"The marriage was a valuable consideration, which fixed the interest in the grantee against all the world; she is regarded from that time as a purchaser, and as much so as if she had then paid an adequate pecuniary consideration. . . . . It is the constant language of the books, and of the courts, that a voluntary deed is made good by a subsequent marriage, and a marriage has always been held to be the highest consideration in law."[1] It is unnecessary to dilate upon this branch of the subject. Where the wife participated in the fraudulent intent and scheme the transaction may of course be annulled.[2] The difficulties of implicating the wife in the fraudulent scheme are from the very nature of things often insuperable. Our meaning is illustrated by the language of Mr. Justice Field in a recent case which we have frequently cited: "It is not at all likely, judging from the ordinary motives governing men, that, whilst pressing his suit with her, and offering to settle property upon her to obtain her consent to the marriage, he informed her that he was insolvent, and would, by the deed he proposed to execute, defraud his creditors. If he intended to commit the fraud imputed to him, it is unreasonable to suppose that he would, by unfolding his scheme, expose his true character to one whose good opinion he was at that time anxious to secure. If capable of the fraud charged, he was capable of deceiving Mrs. Prewit as to his pecuniary condition. She states in her answer that she knew he was embarrassed and in debt, but to what extent, or to whom, she did not know, and that it was because of the knowledge that he was embarrassed that she insisted upon his making a settlement upon her."[3] This is perhaps an extreme case, but it illustrates the statement already ad-

[1] Jones' Appeal, 62 Pa. St. 324; Armfield v. Armfield, Freem. Ch. (Miss.) 311; Smith v. Allen, 5 Allen (Mass.) 454; Andrews v. Jones, 10 Ala. 400; Barrow v. Barrow, 2 Dick. 504.

[2] *Ex parte* McBurnie, 1 De G., M. & G. 441; Fraser v. Thompson, 4 De G. & J. 659.

[3] Prewit v. Wilson, 103 U. S. 23.

vanced, that the creditor will be forced to travel a thorny pathway to annul an ante-nuptial settlement. It is sometimes urged that the courts should not encourage a practice the result of which is, so to speak, to allow a man to barter for a wife for a pecuniary consideration.[1] This is scarcely a fair view of the transaction. By marriage the woman assumes new duties and responsibilities; forsakes a home to which the marriage will ordinarily unfit her to return; promises to live with her husband, and to bear her share of the burdens and cares of the family. Surely in assuming these responsibilities she is entitled to guard against poverty and distress.

§ 213. **Illicit intercourse.**—A contract the consideration of which is future illicit cohabitation is said to be utterly void.[2] But a conveyance in consideration of past cohabitation, intended or regarded as reparation or indemnity for the wrong done, is treated at common law as founded on a *good* consideration, and may be upheld.[3] A transfer, however, to a mistress or her children, by way of gift or advancement, although not looking to future cohabitation, and intended merely as a provision for maintenance, is invalid as against existing creditors.[4] This distinction is manifestly important. In Wait v. Day[5] the court said, that although the debtor "may have been under no legal liability to the defendant, yet if he paid the money in discharge of what he deemed a moral obligation to indemnify the defendant against the consequences which had already resulted from their illicit intercourse, I think the case would not be within the statute. He had made her the mother

[1] "There is certainly something very repulsive in the idea of a parent bartering off an amiable and accomplished daughter for lands and negroes, as he would sell a lamb for the shambles." Davidson v. Graves, Riley's (S. C.) Eq. 236.

[2] Potter v. Gracie, 58 Ala. 305; Jackson v. Miner, 101 Ill. 559.

[3] Ibid.

[4] Potter v. Gracie, 58 Ala. 305.

[5] 4 Den. (N. Y.) 439, 444.

of two illegitimate children, and was at liberty to refund the money which she had already expended for the necessary support and education of those children. Where there is an existing obligation, either legal or moral, to pay so much money, and the payment is not made with any reference to the future, nor by way of mere gratuity, the case is not within the mischief against which the legislature intended to provide." The same principle was applied in Fellows v. Emperor.[1] In that case the grantee had been deceived into a marriage with the grantor, and had innocently lived with him for years, supposing she was his lawful wife. It subsequently transpired that he had another wife living, whereupon she left him. The court, in sustaining the conveyance, held that the grantor was under the strongest moral, if not legal obligation, to compensate the grantee for her services, and to indemnify her as far as he could in a pecuniary point of view, against the consequences of his fraudulent and illegal acts. The conveyance was upheld against creditors.[2]

§ 214. **Illegal consideration.**—One who has freely paid his money upon an illegal contract is *particeps criminis*, and no cause of action arises in his favor upon an implied promise to repay it. But when an insolvent debtor, or one in embarrassed circumstances, pays his money upon such illegal consideration, he stands, in relation to his creditors, in the same position as if he had made a voluntary conveyance of his property. In contemplation of law he has in fact parted with his money for no consideration,[3] because

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[1] 13 Barb. (N. Y.) 97.

[2] *Improper influences.*—Conveyances made by a dissolute man to a prostitute, who had a strong influence over him, may be annulled. Shipman v. Furniss, 69 Ala. 555, and cases cited; s. c. 44 Am. Rep. 528, and the learned note of Irving Browne, Esq., at p. 537; also Leighton v. Orr, 44 Iowa 679; Dean v. Negley, 41 Pa. St. 312; Kessinger v. Kessinger, 37 Ind. 341. See § 13 and note on "Undue Influence," giving the substance of the opinion in Shipman v. Furniss, 69 Ala. 555.

[3] 1 Story's Eq. §§ 353, 354; Clark v. Gibson, 12 N. H. 386.

it is no consideration which can be set up in a court of law.[1]

§ 215. **Moral obligations.**—A debtor may acknowledge and prefer a claim barred by the statute of limitations, and such conduct is not conclusive evidence of a want of good faith;[2] and he is not bound to set up the statute of frauds;[3] and an agreement by a husband to convey certain lands to his wife in consideration of her relinquishing an inchoate interest in his lands, which she carried out, is founded upon a valid consideration which the husband had a right to discharge.[4] So it is not absolutely necessary to the *bona fides* of a charge of interest in an account, that it should be of such a character that it might be recovered in a suit at law brought by a creditor against his debtor. There are many dealings amongst men in which interest is habitually charged and paid, when it could not be claimed on the ground of strict legal right. These transactions are regarded as fair and just as between the parties, and they cannot be considered fraudulent as to others.[5]

§ 216. **Individual and copartnership debts.**—One partner, it is asserted, cannot usually make a valid transfer of firm property in payment of his individual debt without the consent of his copartner.[6] It is said that every one is bound to know that a partner has no right to appropriate the partnership property to the payment of his individual debts, and if one so deals with him he must run the risk of the interposition of partnership rights.[7] This broad proposition is disputed in Schmidlapp v. Currie.[8] The court

[1] Weeks v. Hill, 38 N. H. 205. See *infra*, Void and Voidable Acts.

[2] French v. Motley, 63 Me. 326; Keen v. Kleckner, 42 Pa. St. 529.

[3] Cresswell v. McCaig, 11 Neb. 227; Cahill v. Bigelow, 18 Pick. (Mass.) 369.

[4] Brown v. Rawlings, 72 Ind. 505. But compare Collinson v. Jackson, 8 Sawyer 357.

[5] Spencer v. Ayrault, 10 N. Y. 205.

[6] Hartley v. White, 94 Pa. St. 36; Todd v. Lorah, 75 Pa. St. 155. But see Crook v. Rindskopf, 105 N. Y. 482.

[7] Todd v. Lorah, 75 Pa. St. 156.

[8] 55 Miss. 600. See Crook v. Rindskopf, 105 N. Y. 482.

said: "The firm creditors at large of a partnership have no lien on its assets, any more than ordinary creditors have upon the property of an individual debtor. The power of disposition over their property, inherent in every partnership, is as unlimited as that of an individual, and the *jus disponendi* in the firm, all the members co-operating, can only be controlled by the same considerations that impose a limit upon the acts of an individual owner, namely, that it shall not be used for fraudulent purposes. So long as the firm exists, therefore, its members must be at liberty to do as they choose with their own, and even in the act of dissolution they may impress upon its assets such character as they please. The doctrine that firm assets must first be applied to the payment of firm debts, and individual property to individual debts, is only a principle of administration adopted by the courts, where from any cause they are called upon to wind up the firm business, and find that the members have made no valid disposition of, or charges upon, its assets."[1] A transfer by one of the partners, or a lien created by him on the *corpus* of the partnership property to pay an individual debt has been in effect declared in New York to be fraudulent and void as to the creditors of the firm, unless the firm was solvent at the time.[2] But Chief-Justice Ruger said in Crook v. Rindskopf:[3] "It is lawful for an insolvent member of a firm, to devote his individual property to the payment of firm debts, to the exclusion of his individual creditors."[4] The authorities as to what dispositions of individual or of copartnership assets will be upheld as against the respective classes of creditors

[1] See Roach v. Brannon, 57 Miss. 490. Distinguished in Goodbar v. Cary, 4 Woods 668.

[2] Menagh v. Whitwell, 52 N. Y. 146; Goodbar v. Cary, 4 Woods 668. See Wilson v. Robertson, 21 N. Y. 587; Keith v. Fink, 47 Ill. 272. Compare Case v. Beauregard, 99 U. S. 119; Shanks v. Klein, 104 U. S. 18; Crook v. Rindskopf, 105 N. Y. 482.

[3] 105 N. Y. 482.

[4] Citing Dimon v. Hazard, 32 N. Y. 65; Saunders v. Reilly, 105 N. Y. 12; Royer Wheel Co. v. Fielding, 101 N. Y. 504; Kirby v. Schoonmaker, 3 Barb. Ch. (N. Y.) 46.

are not in very satisfactory shape. It seems perfectly clear, however, that where the courts get possession of the funds for distribution, the distinction between the rights of the two classes of creditors will be respected and preserved.

§ 217. **Future advances.**—A judgment or mortgage may be taken and held as security for future advances and responsibilities to the extent of the security, when that forms a part of the original agreement between the parties.[1] "It is frequent," says Chief-Justice Marshall, "for a person who expects to become more considerably indebted, to mortgage property to his creditor, as a security for debts to be contracted, as well as for that which is already due."[2] But in order to secure good faith and prevent error and imposition in dealing, it is necessary that the agreement, as contained in the record of the lien, whether by mortgage or judgment, should give all the requisite information as to the extent and character of the contract.[3]

§ 218. **Services by members of a family.**—In the absence of an express agreement the law will not imply a promise to pay a daughter for services rendered in the debtor's family,[4] and a mortgage given to a daughter under such circumstances, will be held to be without consideration, and fraudulent as against creditors.[5] A conveyance by an insolvent husband to his wife, in pursuance of a contract to compensate her for services in taking care of his aged mother, who resided with him, has been held in New York to be invalid and voidable as against creditors. The Court

[1] Truscott v. King, 6 N. Y. 157, and cases cited; Robinson v. Williams, 22 N. Y. 380. See Ackerman v. Hunsicker, 85 N. Y. 50.

[2] United States v. Hooe, 3 Cranch 89. See Lawrence v. Tucker, 23 How. 14; Leeds v. Cameron, 3 Sumner 492, per Story, J.; Conard v. Atlantic Ins. Co., 1 Pet. 448.

[3] Hart v. Chalker, 14 Conn. 77.

[4] Miller v. Sauerbier, 30 N. J. Eq. 74; Irish v. Bradford, 64 Iowa 303.

[5] Gardner's Admr. v. Schooley, 25 N. J. Eq. 150. See Ridgway v. English, 22 N. J. Law 409; Updike v. Titus, 13 N. J. Eq. 151; Coley v. Coley, 14 N. J. Eq. 350; Updike v. Ten Broeck, 32 N. J. Law 105; Prickett v. Prickett, 20 N. J. Eq. 478.

of Appeals of that State decided that the wife, by rendering service to her husband's mother, was simply performing a marital duty which she owed to her husband; that where she received no payment for the discharge of this duty from the person to whom the service was rendered, and was entitled to none, and brought no money or property to the husband by her service, she could not stipulate for compensation.[1] Earl, J., said: "It would operate disastrously upon domestic life, and breed discord and mischief if the wife could contract with her husband for the payment of services to be rendered for him in his home; if she could exact compensation for services, disagreeable or otherwise, rendered to members of his family; if she could sue him upon such contracts, and establish them upon the disputed and conflicting testimony of the members of the household. To allow such contracts would degrade the wife by making her a menial and a servant in the home where she should discharge marital duties in loving and devoted ministrations, and frauds upon creditors would be greatly facilitated, as the wife could frequently absorb all her husband's property in the payment of her services, rendered under such secret, unknown contracts."[2]

§ 219. **Proof of consideration.**—In Hanford v. Artcher,[3] in speaking of the presumption of fraud arising from a failure to change possession, the court said that, to rebut this presumption, the statute imposed upon the party claiming under a sale or a mortgage, the burden of proving good faith and an absence of any intent to defraud creditors. "Proof of a valuable consideration," said Senator Hopkins, "or an honest debt, is essential to show good faith; and, if there be no such proof, I take it that the

[1] Coleman v. Burr, 93 N. Y. 17, 25; S. C. 17 Weekly Dig. (N. Y.) 233. Compare Filer v. N. Y. Central R.R. Co., 49 N. Y. 47; Whitaker v. Whitaker, 52 N. Y. 368; Brooks v. Schwerin, 54 N. Y. 344; Birkbeck v. Ackroyd, 74 N. Y. 356; Reynolds v. Robinson, 64 N.Y.589.

[2] See Grant v. Green, 41 Iowa 88; Dowell v. Applegate, 8 Sawyer 427.

[3] 4 Hill (N. Y.) 295.

requirement of the statute in this respect is not complied with, and that the court may order a nonsuit. . . . . Such proof of consideration, too, must go beyond a mere paper acknowledgment of it, that might be binding between the parties." It is said by Chief-Justice Elliott, in Rose v. Colter,[1] that "if it be shown that a valuable consideration was paid for the property, and that when the sale was made the seller was possessed of property far more than sufficient to pay all his debts, the presumption arising from the retention of possession is plainly overcome." As we have already said, there ought to be a fair and reasonable consideration corresponding to the value of the article sold.[2]

§ 220. **Recitals of consideration as evidence.**—It is said in Hubbard v. Allen,[3] that when a controversy arises between the grantee and an existing creditor as to the validity of a conveyance, it is a settled rule to regard the recital of a consideration as a mere declaration or admission of the grantor, and not as evidence against the creditor.[4]

§ 221. **Explaining recitals.**—A conveyance of land made by a husband to his wife purported to be executed in consideration of love and affection, "and for the sum of one dollar cash in hand paid, the receipt whereof is hereby acknowledged." The court held that, the money consideration being manifestly nominal, parol evidence was inadmissible, in an action brought to set aside the deed as in fraud of creditors, to show that there was in fact an adequate pecuniary consideration.[5] But, in another case, where the consideration expressed in the deed was "five hundred

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[1] 76 Ind. 593.

[2] State v. Evans, 38 Mo. 150–154. See § 209.

[3] 59 Ala. 296.

[4] Citing McCain v. Wood, 4 Ala. 258; Branch Bank of Decatur v. Kinsey, 5 Ala. 9; McGintry v. Reeves, 10 Ala. 137; McCaskle v. Amarine, 12 Ala. 17; Falkner v. Leith, 15 Ala. 9; Dolin v. Gardner, 15 Ala. 758. See Kimball v. Fenner, 12 N. H. 248.

[5] Houston v. Blackman, 66 Ala. 559, 564; Galbreath v. Cook, 30 Ark. 417. See Potter v. Gracie, 58 Ala. 308.

dollars and other good causes and considerations," it was held competent to prove the consideration of blood.[1] This general subject is referred to in Hinde's Lessee v. Longworth,[2] where it was said, that if the evidence had been offered for the purpose of showing that the deed was given for a *valuable consideration*, and in satisfaction of a debt, and not for the consideration of *love and affection* as expressed in the deed, it might well be considered as contradicting the deed. It would then be substituting a *valuable* for a *good* consideration, and a violation of the well-settled rule of law, that parol evidence is inadmissible to annul or substantially vary a written agreement.[3] The subject was further considered in Betts v. Union Bank of Maryland,[4] a case argued by Reverdy Johnson on one side, and by Roger B. Taney, afterward Chief-Justice of the United States, on the other, and the conclusion of the court was that marriage cannot be given in evidence as the consideration of a deed of bargain and sale expressed to be made for a money consideration only.[5] A mortgage, the expressed consideration for which was $1,000, may be explained by showing that it was in fact given to secure the mortgagee against liability on two accommodation notes of $500 each.[6] The recital that the consideration has been paid may generally be contradicted by parol evidence;[7] and

[1] Pomeroy v. Bailey, 43 N. H. 118.

[2] 11 Wheat. 214.

[3] See Cunningham v. Dwyer, 23 Md. 219.

[4] 1 Harr. & G. (Md.) 175.

[5] Galbreath v. Cook, 30 Ark. 425; Davidson v. Jones, 26 Miss. 63. In Scoggin v. Schloath, 15 Ore. 383, the court said: "The better rule appears to be that if the consideration expressed in the deed is natural love and affection, it cannot be shown to have been executed for a valuable consideration; or if voluntary, or on consideration of marriage and the like, it cannot be shown that the consideration was a moneyed one. This would be proving by parol that the consideration was different *in kind* from that expressed in the deed, and upon well-considered authority, is not allowable."

[6] McKinster v. Babcock, 26 N. Y. 378. See Truscott v. King, 6 N. Y. 147; Lawrence v. Tucker, 23 How. 14.

[7] Bingham v. Weiderwax, 1 N. Y. 514; Baker v. Connell, 1 Daly (N. Y.) 470; Altringer v. Capeheart, 68 Mo. 441; Miller v. McCoy, 50 Mo. 214; Rhine v. Ellen, 36 Cal. 362, 370; Sanford v. Sanford, 61 Barb. (N. Y.) 302;

indeed there seems to be a prevalent tendency in the courts to admit parol proof of the true consideration of a deed in almost every case, though the fight is kept up to exclude evidence of consideration different in kind from that set forth in the instrument. Manifestly the recitals are not binding upon creditors in any event.

§ 222. **Sufficient consideration.**—A bond given by a minor son to his father in consideration of permission to leave home and work for himself, or for his board while he remains at home and works on his own account, if *bona fide*, is neither against the policy of the law nor fraudulent as to creditors.[1] And where a wife advances to her husband money to purchase land, under an agreement that the money shall be repaid to her children and its payment secured by mortgage, the contract is valid and may be set up as a defense to a suit charging the husband with mortgaging the lands to his children in fraud of creditors.[2]

§ 223. **Insufficient consideration.**—A deed from a debtor to his creditor is voluntary and not founded on a sufficient consideration if it is given for a pre-existing debt which was afterward treated by the parties as still due.[3] And, as against creditors of an insolvent, a party cannot make title to his property as a purchaser for a valuable consideration, where what purports to be the consideration is a debt against a third person which is found as matter of fact to be worthless; and this is true even though the transaction was in good faith on the part of the vendee.[4]

Arnot v. Erie Railway Co., 67 N. Y. 321; Baker v. Union Mutual Life Ins. Co., 43 N. Y. 287; Harper v. Perry, 28 Iowa 63; Lawton v. Buckingham, 15 Iowa 22; Pierce v. Brew, 43 Vt. 295; Anthony v. Harrison, 14 Hun (N. Y.) 210; Morris v. Tillson, 81 Ill. 616; Taggart v. Stanbery, 2 McLean 546; Wheeler v. Billings, 38 N. Y. 264; Adams v. Hull, 2 Denio (N. Y.) 306; Miller v. McKenzie, 95 N. Y. 578; Scoggin v. Schloath, 15 Ore. 383.

[1] Geist v. Geist, 2 Pa. St. 441.

[2] Goff, Assignee, v. Rogers, 71 Ind. 459.

[3] Oliver v. Moore, 23 Ohio St. 479; Starr v. Starr, 1 Ohio 321.

[4] Seymour v. Wilson, 19 N. Y. 417.

CHAPTER XVI.

INDICIA OR BADGES OF FRAUD.

§ 224. The creditor's embarrassments—Proof of fraud.
225. Badges of fraud defined.
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227. Circumstantial and direct evidence.
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242. Effect of relationship upon debtor's transactions.
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244. Comments.

§ 224. **The creditor's embarrassments—Proof of fraud.**—The practical difficulties which a creditor encounters in seeking to discover equitable assets, or to reach property fraudulently alienated by the debtor, have already been the subject of comment.[1] A transaction or conveyance having every appearance of fairness and legality, and to which the ordinary presumptions of good faith attach,[2] is usually presented at the threshold of the litigation. The debtor, and the fraudulent alienees acting in collusion with him, will be found, in most instances, to have taken every precaution to hide the evidences and traces of their frauds,[3] and, ordinarily, the guilty participants develop into witnesses prolific of plausible statements and ingenious subterfuges devised to uphold the colorable transactions. An intent to defraud is not published to the world, but, on the contrary,

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[1] See §§ 5, 6, 13.

[2] See § 6.

[3] Cowling v. Estes, 15 Bradw. (Ill.) 261.

the usual course of the participants is to give to the contract the appearance of an honest transaction, and to have the conduct of the interested parties correspond, as far as possible, with a *bona fide* act.[1] Parties practicing fraud almost uniformly resort to expedients to conceal the evidence of it.[2] Fraud always takes a tortuous course, and endeavors to cover and conceal its tracks.[3] Lord Mansfield said: "Hardly any deed is fraudulent upon the mere face of it."[4] Chief-Justice Bricknell observed: "Where a fraud is contemplated and committed upon creditors, concealment of it is the first, and generally the most persistent, effort of those who are engaged in it. Publicity would render their acts vain and useless. Leaving direct and positive evidence accessible to those injured by it would be the equivalent of a confession of the culpable intent, and of the defeasible character of the transaction. There are numerous circumstances, so frequently attending sales, conveyances, and transfers intended to hinder, delay, and defraud creditors, that they are known and denominated *badges of fraud*. They do not constitute—are not elements of fraud, but merely circumstances from which it may be inferred."[5]

The question presents itself, how can a creditor most effectually thwart the deep-laid schemes of the debtor and his fraudulent alienees, and overcome the usual presumptions of honesty and good faith which the parties will invoke? No witness can look into the minds of the parties and thus be able to swear positively that they intended to defraud the creditors of the vendor; and, hence, as we have already shown in this discussion,[6] fraud can generally

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[1] Tognini v. Kyle, 15 Nev. 468.

[2] Sarle v. Arnold, 7 R. I. 585; Cowling v. Estes, 15 Bradw. (Ill.) 261.

[3] Marshall v. Green, 24 Ark. 418. See § 13.

[4] Worseley v. De Mattos, 1 Burr. 467, 484.

[5] Thames v. Rembert, 63 Ala. 567; Weaver v. Owens, 16 Ore. 304; Hickman v. Trout, 83 Va. 491.

[6] See § 13.

be established only by facts and circumstances which tend directly or indirectly to indicate its existence.[1] Experience shows that positive proof of fraudulent acts is not generally to be expected, and for that reason, among others, the law allows a resort to circumstances as the means of ascertaining the truth.[2] "A deduction of fraud," says Kent, "may be made not only from deceptive assertions and false representations, but from facts, incidents, and circumstances which may be trivial in themselves, but decisive evidence in the given case of a fraudulent design."[3] "Circumstances altogether inconclusive," says Clifford, J.,[4] "if separately considered, may, by their number and joint operation, especially when corroborated by moral coincidences, be sufficient to constitute conclusive proof." Or they may be "a link in a chain, which, altogether, is very strong."[5] Wills says:[6] "Although neither the combined effect of the evidence, nor any of its constituent elements, admits of numerical computation, it is indubitable, that the proving power increases with the number of the independent circumstances and witnesses, according to a geometrical progression. 'Such evidence,' in the words of Dr. Reid, 'may be compared to a rope made up of many slender filaments twisted together. The rope has strength more than sufficient to bear the stress laid upon it, though no one of the filaments of which it is composed would be sufficient for that purpose.'"[7] It can seldom be the duty of the court to instruct the jury that a single fact will warrant the jury in finding fraud. All the facts surrounding the transaction must be taken into account collectively.[8] The judgment must be based "upon all the circumstances of the particular

[1] Thomas v. Sullivan, 13 Nev. 249; Wheelden v. Wilson, 44 Me. 18.

[2] Castle v. Bullard, 23 How. 172, 187; Goshorn v. Snodgrass, 17 W. Va. 717.

[3] 2 Kent's Com., p. 484.

[4] Castle v. Bullard, 23 How. 187.

[5] Engraham v. Pate, 51 Ga. 537.

[6] Wills on Circumstantial Ev., p. 273.

[7] Citing Reid's Essay on the Intellectual Powers, Chap. III.

[8] Sleeper v. Chapman, 121 Mass. 404–409.

case."[1] The frequency with which fraud is practiced upon creditors; the difficulties of its detection; the powerful motives which tempt an insolvent debtor to commit it;[2] the plausible casuistry by means of which it is sometimes reconciled to the consciences even of persons whose previous lives have been without reproach; these are the considerations which prevent the court from classing it among the grossly improbable violations of moral duty; and therefore judges often presume it from facts which may seem slight.[3] "Fraud," says the Supreme Court of Iowa, "cannot always be shown by direct evidence, but is usually proved by circumstances. Neither can the knowledge of or participation in fraudulent designs and transactions be proved in many cases except by circumstances."[4] The very charge of fraud "implies color and disguise, to be dissipated by *indicia* alone."[5] The signs or earmarks of fraud instanced in Twyne's Case[6] have already been given,[7] and should be kept fresh in the memory of parties interested in this class of litigation. Mr. Roberts says, that the general conclusion to be derived from this remarkable case is "that evidence of the fraudulent intent supersedes the whole inquiry into the consideration, for no merit in any of the parties to a transaction can save it if it carries intrinsically or extrinsically the plain characters of fraud."[8] It may be observed that extrinsic proof of fraud can rarely be found unless it be in cases where the possession of the debtor contradicts "the visible purport of an absolute conveyance."

§ 225. **Badges of fraud defined.** — The possible *indicia* of fraud are so numerous that no court could pretend to

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[1] Wait v. Bull's Head Bank, 19 N. B. R. 501.

[2] See § 2.

[3] Goshorn v. Snodgrass, 17 W. Va. 767.

[4] Craig v. Fowler, 59 Iowa 203.

[5] Waterbury v. Sturtevant, 18 Wend. (N. Y.) 353, 362, per Cowen, J.; King v. Moon, 42 Mo. 555.

[6] 3 Rep. 80.

[7] See § 22.

[8] Roberts on Fraudulent Conveyances, 546.

anticipate and catalogue them.[1] "They are as infinite in number and form as are the resources and versatility of human artifice."[2] The statutes of Elizabeth produce the most beneficial effects, by placing parties under a disability to commit fraud in requiring for the characteristics of an honest act such circumstances as none but an honest intention can assume.[3] A badge of fraud was said by Chief-Justice Pearson, in Peebles v. Horton,[4] to be "a fact calculated to throw suspicion on the transaction," and which "calls for explanation."[5] Substantially the same language is used by Elliott, J., in Sherman v. Hogland.[6] So in Pilling v. Otis,[7] the court in construing the meaning of the expression "badge of fraud" as used in the charge of a judge, said: "It does not mean that the evidence must be conclusive, nor that it must require the jury to find fraud, but only that it is one of the signs or marks of fraud, and has a tendency to show it. There may be great difference

[1] Phinizy v. Clark, 62 Ga. 623–627; Hickman v. Trout, 83 Va. 491.

[2] Shealy v. Edwards, 75 Ala. 411, 417.

[3] McKibbin v. Martin, 64 Pa. St. 356; Avery v. Street, 6 Watts (Pa.) 274.

[4] 64 N. C. 376; Shealy v. Edwards, 75 Ala. 417; Terrell v. Green, 11 Ala. 213; Hickman v. Trout, 83 Va. 491.

[5] In Hickman v. Trout, 83 Va. 491, the court say: "Certain circumstances are often referred to as *indicia* of fraud, because they are usually found in cases where fraud exists. Even a single one of them may be sufficient to stamp the transaction as fraudulent. When several are found in the same transaction, strong and clear evidence will be required of the upholder of the transaction to repel the conclusion of frauduient intent. In the case here, ... quite a number of the usual badges of fraud are found grouped together and left unexplained. These are: gross inadequacy of price; no security taken for the purchase-money; unusual length of credit for the deferred instalments; bonds taken payable at long periods, when the pretence is that the deferred instalments evidenced by them had already been satisfied in the main by antecedent debts due by the obligee to the obligor; the conveyance made in payment of alleged indebtedness of father to son, residing together as members of one family; the indebtedness and insolvency of the grantor, and well known to the grantee; the threats and pendency of suits; the secrecy and concealment of the transaction; keeping the deed unacknowledged and unrecorded for over a year; grantor remaining in possession as before the conveyance, and cautioning the kinsman justice, who took the acknowledgment, to keep the matter private, and the relation between grantor and grantee."

[6] 73 Ind. 473.

[7] 13 Wis. 495.

in the weight to which different facts, constituting badges of fraud, are entitled as evidence. One may be almost conclusive, another furnish merely a reasonable inference of fraud. Yet both would be badges of fraud, and either might be so explained by other evidence as to destroy its effect. The books accordingly speak of strong badges and slight badges of fraud, of conclusive badges, and badges not conclusive, meaning by the word 'badge' nothing more than that the fact relied on has a tendency to show fraud, but leaving its greater or less effect to depend on its intrinsic character." The expression is used "to distinguish the lighter grounds on which fraud may be established" as distinguished from the cases where the fraud is apparent upon the face of the instrument and necessarily involves its invalidity.[1] The circumstances which the law considers badges of fraud, and not fraud *per se*, should, as we shall see, be submitted to the jury, so that they may draw their own conclusions.[2] Where, then, a creditor shows *indicia*, or badges of fraud, the burden rests on the grantee to repel the presumptions which the facts so shown generate.[3] It may here be observed that when the consideration for the transfer is clearly established, and the transaction is in effect a preference, it will not be affected by any weak, foolish, or even criminal conduct in the way of an attempt to sustain the case by manufactured evidence.[4]

§ 226. **Question for the jury.**—The question of fraud in a transfer must usually be submitted to a jury,[5] save in a few cases where the transaction is manifestly fraudulent upon its face. The distinction between legal and equitable jurisdiction as to this has already been pointed out;[6] and where the suit is in its nature purely equitable, the judge or chan-

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[1] Burrill on Assignments, 4th ed., § 346, p. 518.

[2] King v. Russell, 40 Tex. 133.

[3] Harrell v. Mitchell, 61 Ala. 270.

[4] Hill v. Bowman, 35 Mich. 191, per Cooley, C. J.

[5] Weaver v. Owens, 16 Ore. 304.

[6] See § 51.

cellor is responsible for the decision, though, of course, he may secure the aid of a jury to pass upon framed issues.[1] Otherwise the jury must be permitted to consider and draw their own inferences from badges of fraud, and the court should not interfere to formulate conclusions for them.[2] To say that badges of fraud "constitute fraud in themselves, would be to carry the doctrine beyond the limits of reason or authority, and to shut out the light of wisdom and truth."[3] Where the entire suit is tried by and submitted to the court, without the aid of a jury, as is frequently the case in equity, the same consideration and effect should be given by the court to badges of fraud as though a jury had been summoned.

§ 227. **Circumstantial and direct evidence.** — In Kempner v. Churchill[4] it appeared that the purchaser said to the debtor: "You had better not delay this matter. You had better let me have the goods and put the money in your pocket, and let the creditors go to the devil." The circumstantial evidence which was held ample to confirm this direct evidence of fraud, was as follows: First, false receipts given for full value on Saturday; second, account of stock made out on Sunday; third, removal of the goods into a cellar on Monday. "It is true the fraud must be in the inception of the transaction, but the subsequent acts of the parties are calculated to explain the motives which actuated them in the beginning, and give tone to the then original purpose."[5]

§ 228. **Recital of fictitious consideration.**—Let us now proceed to consider more minutely the particular circumstances and surroundings of a transaction which constitute

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[1] Dunphy v. Kleinsmith, 11 Wall. 615. Leasure v. Coburn, 57 Ind. 274; Herkelrath v. Stookey, 63 Ill. 486; King v. Russell, 40 Tex. 133.

[2] Wilson v. Lott, 5 Fla. 316.

[3] 8 Wall. 369.

[4] Adler v. Apt, 31 Minn. 348, 350. See Hungerford v. Earle, 2 Vern. 261; Blennerhassett v. Sherman, 105 U. S. 100; Blackman v. Preston, 24 Ill. App. 240; Coates v. Gerlach, 44 Pa. St. 43.

badges of fraud, or awaken suspicions or create presumptions of the existence of fraud.

A false statement of the consideration of a mortgage,[1] or of a conveyance or transfer,[2] or the creation of a fictitious indebtedness,[3] is a badge of fraud, and is a proper element for the consideration of the jury in determining the *bona fides* of the transaction.[4] Such a recital does not usually render the instrument void *per se*,[5] and in some instances the transaction will be allowed to stand for the amount of the consideration given,[6] and will be void only for the excess.[7] So the issuing of an execution for an excessive amount will, in the absence of bad faith, avail the plaintiff to the extent of the debt remaining due.[8] It may be observed here that the recital of the excessive consideration must be intentional, and not the result of a mere mistake in computation,[9] and both parties must have participated

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[1] United States v. Griswold, 7 Sawyer 306; Stinson v. Hawkins, 16 Fed. Rep. 850; Lynde v. McGregor, 13 Allen (Mass.) 179; McKinster v. Babcock, 26 N. Y. 382; Weeden v. Hawes, 10 Conn. 50; Butts v. Peacock, 23 Wis. 359; Blakeslee v. Rossman, 43 Wis. 123; Stover v. Herrington, 7 Ala. 142; Goff v. Rogers, 71 Ind. 459; Cordes v. Straszer, 8 Mo. App. 61; Venable v. Bank of U. S., 2 Pet. 112, per Story, J.; King v. Hubbell, 42 Mich. 599, per Cooley, J. See Keith v. Proctor, 8 Baxt. (Tenn.) 189; Shirras v. Caig, 7 Cranch 50.

[2] Peebles v. Horton, 64 N. C. 374; Enders v. Swayne, 8 Dana (Ky.) 105; Thompson v. Drake, 3 B. Mon. (Ky.) 570; Foster v. Woodfin, 11 Ired. (N. C.) Law 346; Gibbs v. Thompson, 7 Humph. (Tenn.) 179; Turbeville v. Gibson, 5 Heisk. (Tenn.) 565; Marriott v. Givens, 8 Ala. 694; Divver v. McLaughlin, 2 Wend. (N. Y.) 600.

[3] Winchester v. Charter, 97 Mass. 140.

[4] Miller v. Lockwood, 32 N. Y. 299; Willison v. Desenberg, 41 Mich. 156; Lawson v. Alabama Warehouse Co., 80 Ala. 343. Elliott, J., said, in Goff v. Rogers, 71 Ind. 461: "There are no cases, however, that we have been able to find, going so far as to hold that a mortgage is to be conclusively presumed fraudulent from the bare fact that it purports, on its face, to secure a sum in excess of the debt really due. The farthest that any of the cases go, except those based on an express statute, is to hold that the fact that a mortgage expresses on its face an amount materially greater than the true amount of indebtedness, is a badge of fraud."

[5] Frost v. Warren, 42 N. Y. 207; Barkow v. Sanger, 47 Wis. 505.

[6] Coley v. Coley, 14 N. J. Eq. 354.

[7] Davenport v. Wright, 51 Pa. St. 292. See §§ 192, 195.

[8] Harris v. Alcock, 10 G. & J. (Md.) 227.

[9] Kalk v. Fielding, 50 Wis. 340.

in the fraudulent purpose.[1] Hence, where a wife is ignorant and innocent of fraud, the insertion of an inaccurate or untrue recital in a settlement will not vitiate it.[2] An immaterial misrecital will not be regarded.[3]

It is not our purpose, however, to lead the reader to consider an exaggerated or false recital of consideration as an unimportant factor in proving fraud. Far from it. In Hawkins v. Alston,[4] Chief-Justice Ruffin forcibly said: "No device can be more deceptive and more likely to baffle, delay, or defeat creditors, than the creating incumbrances upon their property by embarrassed men, for debts that are fictitious or mainly so. The false pretence of a debt, or the designed exaggeration of one, is an act of direct fraud." Mr. May observed, that the fact that confession of judgment "covers more property than is necessary for satisfying the debt, is a suspicious circumstance."[5] Sharswood, J., declared that "a judgment confessed voluntarily by an insolvent or indebted man for more than is due, is *prima facie* fraudulent within the statute of 13 Eliz. c. 5."[6] Then in Warwick v. Petty[7] it is asserted that a judgment laid upon property of a debtor for more than was actually due and owing, is a clear violation of the policy of the law, and is fraudulent, and subject to attack by junior creditors.[8] The judgment, however, must be knowingly, intentionally, and fraudulently obtained for a greater sum than was due.[9] A transaction which on its face speaks an en-

[1] Carpenter v. Muren, 42 Barb. (N. Y.) 300. See § 199.

[2] Kevan v. Crawford, L. R. 6 Ch. D. 39.

[3] Fetter v. Cirode, 4 B.Mon.(Ky.)484.

[4] 4 Ired. Eq. (N. C.) 145.

[5] May's Fraud. Conv. p. 88; citing Tolputt v. Wells, 1 M. & S. 395; Benton v. Thornhill, 7 Taunt. 149; S. C. 2 Marsh. 427; Hodgson v. Newman, mentioned in Holbird v. Anderson, 5 T. R. 236, 239.

[6] Clark v. Douglass, 62 Pa. St. 415.

[7] 44 N. J. Law 542.

[8] Clapp v. Ely, 27 N. J. Law 555. Compare Sayre v. Hewes, 32 N. J. Eq. 652; Hoag v. Sayre, 33 N. J. Eq. 552; Holt v. Creamer, 34 N. J. Eq. 187; Russell v. Winne, 37 N. Y. 596.

[9] Fairfield v. Baldwin, 12 Pick. (Mass.) 388; Davenport v. Wright, 51 Pa. St. 292. Compare Peirce v. Partridge, 3 Met. (Mass.) 44; Felton v. Wadsworth, 7 Cush. (Mass.) 589.

tirely different language from the real one, will always be "viewed by the law with the highest degree of distrust and disapprobation,"[1] and will be "the object of doubt and suspicion,"[2] though, as we have seen, suspicion alone is insufficient to establish fraud.[3]

It results, then, from a review of the authorities, that a false recital of consideration in an instrument, in the absence of explanation, justifies a finding of fraud; that the misrecital must be intentional and not accidental, and is subject to explanation; and that the evil design must be mutual; otherwise the transaction will stand against creditors except as to the excess.

§ 229. **Antedating instrument.**—Antedating an instrument seems to be regarded as an *indicium* of fraud,[4] and testimony tending to establish a fraudulent antedating of a paper is competent.[5] Antedating a mortgage, though very improper, does not, however, affect a mortgagee who is not privy to it.[6] It may be remarked that the date of a deed is not generally regarded as an essential part of the instrument; it may be good with an impossible date, or have no date, and though the date is *prima facie* evidence of the time of delivery, it may be contradicted.

§ 230. **Description of the property.**—A suspicion or inference of fraud is sometimes predicated of a loose and vague description of the goods or property conveyed. "All the entire stock of goods in the possession of the said Lee, in his store in the city of Williamsburg," were the words used in Lang v. Lee,[7] and in commenting upon the case the court said: "Does this look like a real *bona fide* transaction?" A clause in a mortgage by which

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[1] Ayres v. Husted, 15 Conn. 513.
[2] Pickett v. Pipkin, 64 Ala. 526.
[3] See §§ 5, 6.
[4] Wright v. Hencock, 3 Munf. (Va.) 521. But compare Patterson v. Bodenhamer, 9 Ired. (N. C.) Law 96.
[5] Moog v. Benedicks, 49 Ala. 513.
[6] Lindle v. Neville, 13 S. & R. (Pa.) 228.
[7] 3 Rand. (Va.) 423.

after-acquired property was attempted to be covered, was regarded as a feature for the consideration of the jury in Gardner v. McEwen.[1] So in a case in Tennessee,[2] in which the description in the conveyance was so indefinite and general that it was impossible to designate the property, this was considered a circumstance to be taken into account by the jury as an evidence of fraud.[3] Still it does not follow by any means that an imperfect description of property in an instrument is of much weight as a badge of fraud. Carelessness in the character of the description in conveyances of realty, or in bills of sale, or mortgages of personalty, is very common in transactions concerning the good faith of which no question can fairly be raised. Misdescriptions are often the handiwork of honest but blundering scriveners.

§ 231. **Conveyance of whole estate.**—Lowell, J., observes: "I have often decided that the conveyance of the whole property of a debtor affords a very violent presumption of a fraudulent intent, so far as existing creditors are concerned."[4] In Bigelow v. Doolittle,[5] however, the court refused to charge that "the conveyance of the whole property of a debtor affords a very violent presumption of a fraudulent intent, so far as existing creditors are concerned." In sustaining the ruling the appellate court observed that the generality of the conveyance was merely a circumstance to be considered by the jury in connection with all the other facts of the case, in determining whether or not the sale was fraudulent. Lyon, J., said: "Under

[1] 19 N. Y. 125.

[2] Overton v. Holinshade, 5 Heisk. (Tenn.) 683.

[3] See § 157.

[4] *In re* Alexander, 4 N. B. R. 181 [*46]. See Goshorn v. Snodgrass, 17 W. Va. 717; Glenn v. Glenn, 17 Iowa 498–501; Hartshorn v. Eames, 31 Me. 99; Sarle v. Arnold, 7 R. I. 582; Sayre v. Fredericks, 16 N. J. Eq. 207; Clark v. Wise, 39 How. Pr. (N. Y.) 97; reversed, 46 N. Y. 612; Monell v. Scherrick, 54 Ill. 270; Redfield v. Buck, 35 Conn. 328; Bradley v. Buford, Sneed (Ky.) 12.

[5] 36 Wis. 119. See Bishop v. Stebbins, 41 Hun (N. Y.) 246.

some conditions the jury might regard such conveyance as raising a very violent presumption of fraud, while under other and different conditions the jury might properly determine that it was but a slight indication of a fraudulent intent."[1] Such a transfer must, however, be regarded as altogether unusual and extraordinary. The instances in which such transactions would occur in the usual course of business are very infrequent, and when the alienation proceeds from an embarrassed debtor, it creates a presumption of dishonesty and fraud.[2] The transfer, however, is not to be declared void as matter of law under such circumstances. Hence, a sale by an insolvent debtor of all his real and personal estate, taking back notes payable in six, twelve, and eighteen months, is not *per se* fraudulent; to avoid it there must be a finding of an actual fraudulent intent.[3] When questions of relationship intervene, the motive for making these absolute conveyances becomes important. Hence where, pending a suit, a debtor transferred all his property, save that which was exempt, to his wife, and hired out to her for his "board, clothing, and lodging," the transaction was held to afford grounds for suspicion, and to call for satisfactory proof of good faith and fair consideration.[4] Commenting upon the effect of the generality of the gift, Mr. May says,[5] that it is "when taken in conjunction with other circumstances, a mark of fraud[6] for *dolus versatur in generalibus*;[7] yet it is no con-

[1] Bigelow v. Doolittle, 36 Wis. 119; s. p. Kerr v. Hutchins, 46 Tex. 389–390.

[2] See Bibb v. Baker, 17 B. Mon. (Ky.) 305; Wheelden v. Wilson, 44 Me. 20; Hughes v. Roper, 42 Tex. 126.

[3] Clark v. Wise, 46 N. Y. 612. See Bigelow v. Doolittle, 36 Wis. 119; Alton v. Harrison, L. R. 4 Ch. App. 626. Compare Bank of Ga. v. Higginbottom, 9 Pet. 61.

[4] Dresher v. Corson, 23 Kans. 315; Booher v. Worrill, 57 Ga. 235. See § 242.

[5] May on Fraudulent Conveyances, p. 82.

[6] Citing Chamberlain v. Twyne (Twyne's Case), F. Moo. 638; Stileman v. Ashdown, 2 Atk. 477; Mathews v. Feaver, 1 Cox's Eq. Cas. 280; Ware v. Gardner, L. R. 7 Eq. 317. See Blennerhassett v. Sherman, 105 U.S. 100.

[7] Citing Twyne's Case, 3 Rep. 81 a; Stone v. Grubham, 2 Bulstr. 225.

cluding proof either under this statute (13 Eliz. c. 5) or by the common law."[1] Then as we have seen[2] in Twyne's Case, the very first mark of fraud specified was "that the gift was general, without exception of the donor's apparel, or of anything of necessity." Chief-Justice Marshall in the leading case of Sexton v. Wheaton,[3] observed: "The proportional magnitude of the estate conveyed may awaken suspicion, and strengthen other circumstances; but, taken alone, it cannot be considered as proof of fraud." Among the prominent badges of fraud affecting a conveyance as to subsequent creditors may be mentioned the contracting of debts, and engaging in a hazardous business or speculation, with the intention of shouldering the risk of loss upon creditors. The cases and principles appertaining to this subject have already been considered.[4] To this class of evidence, McCrary, J., adds another badge, viz.: "The fraudulent disposition of the remaining estate of the grantor very soon after the conveyance."[5]

§ 232. **Inadequacy of purchase price.**—As has already been shown, to enable a creditor to invalidate a sale of property, tangible facts must be proved, from which a legitimate inference of a fraudulent intent can be drawn. It will not suffice to create a suspicion of wrong, nor will the jury be permitted to guess at the truth.[6] Mere proof of inadequacy of price by itself has been considered insufficient to implicate the vendee in the fraudulent intent, or to impeach his good faith,[7] and inadequacy of consideration, unless extremely gross,[8] does not *per se* prove fraud.[9] It must ap-

[1] Citing Chamberlain v. Twyne, F. Moo. 638; Nunn v. Wilsmore, 8 T. R. 528; Ingliss v. Grant, 5 T. R. 530; Meux v. Howell, 4 East 1; Janes v. Whitbread, 11 C. B. 406; Alton v. Harrison, L. R. 4 Ch. App. 622; Evans v. Jones, 11 Jur. (N. S.) 784.

[2] § 22.

[3] 8 Wheat. 229, 250.

[4] See §§ 96, 99, 100.

[5] Burdick v. Gill, 7 Fed. Rep. 668, 670.

[6] See §§ 5, 6.

[7] Jaeger v. Kelley, 52 N. Y. 274. See Sherman v. Hogland, 73 Ind. 477; McFadden v. Mitchell, 54 Cal. 629. See § 6.

[8] Archer v. Lapp, 12 Ore. 202; Dawson v. Niver, 19 S. C. 606; Witherwax v. Riddle, 121 Ill. 145.

[9] Kempner v. Churchill, 8 Wall. 369.

pear that the price was so manifestly inadequate as to shock the moral sense, and create at once upon its being mentioned a suspicion of fraud.[1] It is even held that in the absence of other evidence tending to show fraud, the court will not deem inadequacy of consideration sufficient to do so.[2] Gordon, J., said: "Other things being fair and honest, mere inadequacy of price cannot, of itself, beget even a presumption of fraud, much less is it *per se* fraudulent."[3] Still, authority is abundant to the effect that where a creditor or purchaser obtains the property or estate of an insolvent debtor at a sacrifice or an under rate or value, there is a strong and even violent presumption of a fraudulent intent.[4] Thus where a first lien for $1,200 on a farm worth $13,000, was transferred for a consideration of $400, this was considered evidence of fraud which must be submitted to a jury.[5] Again it is more strongly stated in Davidson v. Little,[6] that "the sale of lands or goods by an indebted person for less than their value is *ipso facto* a fraud in both vendor and vendee."[7] Where the value was $7,700, and the estimated consideration $1,537, it was held to be conclusively fraudulent.[8] The difference was regarded as "so great as to shock the common sense of mankind, and furnish in itself conclusive evidence of fraud."[9] The question, however, is usually submitted to the consideration of a jury,[10] to determine the intent of the parties,[11] and is almost

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[1] Clark v. Krause, 2 Mackey (D. C.) 566.

[2] Emonds v. Termehr, 60 Iowa 92, 96. See Cavender v. Smith, 8 Iowa 360; Boyd v. Ellis, 11 Iowa 97.

[3] Schatz v. Kirker, 4 East. Rep. [Pa.] 141, 144.

[4] See Shelton v. Church, 38 Conn. 420; Bartles v. Gibson, 17 Fed. Rep. 297; Brown v. Texas Cactus Hedge Co., 64 Tex. 400; Stern Auction & C. Co. v. Mason, 16 Mo. App. 477.

[5] Rhoads v. Blatt, 84 Pa. St. 32; S. C. 1 Am. Insolv. R. 45.

[6] 22 Pa. St. 252.

[7] See Doughten v. Gray, 10 N. J. Eq. 330.

[8] Wilson v. Jordan, 3 Woods 642. See Ratcliff v. Trimble, 12 B. Mon. (Ky.) 32; Borland v. Mayo, 8 Ala. 104; Prosser v. Henderson, 11 Ala. 484.

[9] Hoot v. Sorrell, 11 Ala. 400.

[10] Craver v. Miller, 65 Pa. St. 456.

[11] Motley v. Sawyer, 38 Me. 68.

always linked with other circumstances or *indicia* of fraud.[1] Inadequacy of consideration is a fact calling for explanation, and is often treated as a badge of fraud.[2] Insufficiency of price and insolvency of a debtor, say the Supreme Court of California, may be circumstances more or less potential in the determination of fraud as a question of fact, but failure of consideration is not in itself sufficient to justify a court in finding fraud as matter of law.[3]

§ 233. **Transfer pending suit.**—The transfer of all, or, according to some authorities, of a portion of a man's goods during the pendency of a suit against him is a mark of fraud.[4] One of the circumstances specified in Twyne's Case[5] was that the "transfer was made pending the writ."[6] This fact usually induces the suspicion that the conveyance was made to secure the property from attachment or execution in the pending suit, and to hinder, delay, or defraud creditors.[7] This inference may of course be rebutted.[8] In

[1] Hudgins v. Kemp, 20 How. 50.

[2] See Fisher v. Shelver, 53 Wis. 498; Williamson v. Goodwyn, 9 Gratt. (Va.) 503; Laidlaw v. Gilmore, 47 How. Pr. (N. Y.) 68; Hudgins v. Kemp, 20 How. 50; Fuller v. Brewster, 53 Md. 361; Delaware v. Ensign, 21 Barb. (N. Y.) 85; Ames v. Gilmore, 59 Mo. 537; Scott v. Winship, 20 Ga. 429; Apperson v. Burgett, 33 Ark. 338; Boyd v. Ellis, 11 Iowa 97; Barrow v. Bailey, 5 Fla. 9; Loring v. Dunning, 16 Fla. 119; Bickler v. Kendall, 66 Iowa 703; Douthitt v. Applegate, 33 Kans. 396; Easum v. Pirtle, 81 Ky. 563; Steere v. Hoagland, 39 Ill. 264; Stevens v. Dillman, 86 Ill. 233. See Metropolitan Bank v. Durant, 22 N. J. Eq. 35.

[3] McFadden v. Mitchell, 54 Cal. 629; Jamison v. King, 50 Cal. 133. See Motley v. Sawyer, 38 Me. 68. In Day v. Cole, 44 Iowa 452, the court say that where the incumbrances upon realty, with the consideration paid for its conveyance, very nearly equal its reasonable value, the fact that the consideration is small does not constitute a badge of fraud.

[4] Redfield & Rice Mfg. Co. v. Dysart, 62 Pa. St. 63; Godfrey v. Germain, 24 Wis. 416; Babb v. Clemson, 10 S. & R. (Pa.) 424; Ford v. Johnston, 7 Hun (N. Y.) 568; United States v. Lotridge, 1 McLean 246; Thomas v. Pyne, 55 Iowa 348; Schaferman v. O'Brien, 28 Md. 565; Crawford v. Kirksey, 50 Ala. 590; Hartshorn v. Eames, 31 Me. 99; Soden v. Soden, 34 N. J. Eq. 115; Bean v. Smith, 2 Mason 252; Callan v. Statham, 23 How. 477; Stoddard v. Butler, 20 Wend. (N. Y.) 507; Booher v. Worrill, 57 Ga. 235; Stewart v. Wilson, 42 Pa. St. 450; King v. Wilcox, 11 Paige (N. Y.) 589.

[5] 3 Rep. 80; 1 Smith's Lea. Cas. 33.

[6] See § 22.

[7] See Merrill v. Locke, 41 N. H. 490.

[8] Sipe v. Earman, 26 Gratt. (Va.) 563. See Skipwith v. Cunningham, 8 Leigh (Va.) 271.

Ray v. Roe *ex dem.* Brown,[1] the court said that the pendency of a suit was "one of the many badges of fraud" which would induce a court of equity to set aside a conveyance, or a jury to regard it as covinous. In Shean v. Shay[2] it is characterized as "only one of the badges." The court further said: "The deed may be shown to be fraudulent and void as to creditors when no suit was pending to recover the debt or damages when it was made."

The pendency of a suit is a warning to a dishonest debtor to make haste to alienate and cover up his assets. While the service of process in a suit does not usually create a lien upon the defendant's property, and the doctrine of *lis pendens* is limited in its application, yet transfers pending a suit are justly scanned with very great suspicion; and where it is certain that judgment would be rendered against the vendor, and evidence of inadequacy of consideration is adduced, the courts will conclude that the conveyance is colorable, and made with a view to hinder, delay, and defraud creditors.[3] Mr. May[4] states the rule to be that where the conveyance is made *pendente lite*, it is, "when coupled with other circumstances, suggestive of fraud, but where the consideration is adequate, not a strong mark of a fraudulent intention." This, however, can scarcely be regarded, under the American authorities, as giving this important element of proof its proper weight.

§ 234. **Evidence of secrecy.**—An unusual degree of secrecy observed between the parties in the making of the sale is a badge of fraud;[5] and the secret removal of the property immediately after the sale indicates a dishonest purpose.[6] Circumstances indicative of concealment, or of a design to

[1] 2 Blackf. (Ind.) 258.
[2] 42 Ind. 377.
[3] Jaffers v. Aneals, 91 Ill. 487, 493.
[4] May's Fraudulent Conveyances, p. 83.
[5] Fishel v. Ireland, 52 Ga. 632. See Callan v. Statham, 23 How. 480; Corlett v. Radcliffe, 14 Moo. P. C. 140.
[6] Delaware v. Ensign, 21 Barb. (N. Y.) 88.

give a man the appearance of possessing property which he does not own, are evidences of fraud, and are proper for a jury to weigh.[1] Secrecy "is a circumstance connected with other facts from which fraud may be inferred."[2] An agreement, however, to conceal the fact of a purchase is not *per se* fraudulent, but is merely matter of evidence in favor of avoiding the sale, which, although perhaps very strong, is still capable of explanation.[3] In Haven v. Richardson[4] the court said: "Secrecy is not of itself evidence of fraud. It is likely to accompany fraud, and may give force to other evidence, under particular circumstances." Thus it is held in Massachusetts that an arrangement or understanding in regard to withholding mortgages from record until the mortgagors should have trouble, did not render the mortgages void, but was a matter entitled to consideration by the jury in passing upon the question of fraud at common law.[5] On the other hand, an agreement that the transaction is to be kept secret until the debtor has an opportunity of escaping beyond the reach of process issued by his other creditors, or by which the deed is not to be offered for record until the other creditors threaten suit, will render it fraudulent. Secrecy in such cases is a part of the consideration; the transaction is contaminated by it, and ought not to be regarded as *bona fide*.[6]

§ 235. **Suppression or concealment — Subsequent fraud.** — As long ago as the case of Hungerford v. Earle,[7] it was held that, "a deed not at first fraudulent may afterwards be-

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[1] Ross v. Crutsinger, 7 Mo. 249.

[2] Warner v. Norton, 20 How. 460.

[3] Gould v. Ward, 4 Pick. (Mass.) 104.

[4] 5 N. H. 127. See Blennerhassett v. Sherman, 105 U. S. 117.

[5] Folsom v. Clemence, 111 Mass. 277. See Thouron v. Pearson, 29 N. J. Eq. 487. But compare Hildeburn v. Brown, 17 B. Mon. (Ky.) 779. See § 235.

[6] Hafner v. Irwin, 1 Ired. (N. C.) Law 499. Mr. May regards secrecy as always evidence, but not of itself conclusive evidence of fraud May's Fraudulent Conveyances, p. 83. See Griffin v. Stanhope, Cro. Jac. 454; Worseley v. De Mattos, 1 Burr. 467; Leonard v. Baker, 1 M. & S. 251; Corlett v. Radcliffe, 14 Moo. P. C. 139.

[7] 2 Vern. 261.

come so by being concealed, or not pursued, by which means creditors are drawn in to lend their money." This doctrine has been repeatedly recognized and reaffirmed in different forms in State and Federal tribunals.[1] In Coates v. Gerlach[2] it appeared that a deed of land had been made by a husband directly to his wife. The deed was dated March 23, 1857, but was not filed for record until December 2, 1857, over eight months thereafter. On Jan. 21, 1858, the husband, professing to act as the agent of the wife, effected a sale of the lands to a third party. The creditors of the husband attached the moneys in the hands of the vendees, and a contest arose as to which had the better right to the proceeds of the sale. Touching this controversy, Strong, J., said: "There is another aspect of this case, not at all favorable to the claim of the wife. It is that she withheld the deed of her husband from record until December 2, 1857. In asking that a deed void at law should be sustained in equity, she is met with the fact that she asserted no right under it; in fact, concealed its existence until after her husband had contracted the debts against which she now seeks to set it up. There appears to have been no abandonment of possession by the husband. . . . . Even if the deed was delivered on the day of its date, the supineness of the wife gave to the husband a false credit, and equity will not aid her at the expense of those who have been misled by her laches."[3] In Blennerhassett v. Sherman,[4] Woods, J., in delivering the unani-

[1] Hildreth v. Sands, 2 Johns. Ch. (N. Y.) 35; Scrivenor v. Scrivenor, 7 B. Mon. (Ky.) 374; Bank of the U. S. v. Housman, 6 Paige (N. Y.) 526; Beecher v. Clark, 12 Blatchf. 256; Blennerhassett v. Sherman, 105 U. S. 100; Coates v. Gerlach, 44 Pa. St. 43; Hafner v. Irwin, 1 Ired. (N. C.) Law 490; Blackman v. Preston, 24 Ill. App. 240. See Hildeburn v. Brown, 17 B. Mon. (Ky.) 779; Thouron v. Pearson, 29 N. J. Eq. 487; Stewart v. Hopkins, 30 Ohio St. 502.

[2] 44 Pa. St. 43, 46.

[3] See McWilliams v. Rodgers, 56 Ala. 87.

[4] 105 U. S. 117. In Jaffrey v. Brown, 29 Fed. Rep. 481, the court said: "The mortgages to all the relatives of the defaulting firm . . . . were recorded October 14th, three days before the assignment. The suppression of these

mous opinion of the United States Supreme Court, observed: "But where a mortgagee, knowing that his mortgagor is insolvent, for the purpose of giving him a fictitious credit actively conceals the mortgage which covers his entire estate and withholds it from the record, and while so concealing it represents the mortgagor as having a large estate and unlimited credit, and by these means others are induced to give him credit, and he fails and is unable to pay the debts thus contracted, the mortgage will be declared fraudulent and void at common law, whether the motive of the mortgagee be gain to himself or advantage to his mortgagor."[1] But there must be some evidence of a preconcerted and contrived purpose to deceive and defraud the other creditors of the mortgagor, of which scheme the withholding of the instrument from the record constitutes a part. It is said in Curry v. McCauley:[2] "When the mortgage was executed and delivered nothing further was necessary to its validity as a complete transaction. It has, therefore, been held in Pennsylvania, by a long series of decisions, that, as between the parties, a mortgage takes effect upon delivery, and that an unrecorded mortgage is good against an assignee for the benefit of creditors."

§ 236. **Evidence aliunde.**—In a controversy which arose in Mississippi[3] it was decided that a deed of trust in the nature of a mortgage, valid on its face, and not made or received with any intent to defeat existing or future creditors, may

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mortgages until this critical moment is a badge of fraud as to creditors, and they will be denied validity and effectiveness as liens upon the property of debtors."

[1] In cases where the statute requires that a deed should be recorded within a certain period, and the grantee neglects so to record it, a creditor of the grantor may pursue the ostensible title of the grantor, even though it may not be the real title of the debtor. Nelson v. Henry, 2 Mackey (D. C.) 259. The creditor must not, however, lose sight of the general rule that a judgment is not usually good against an unrecorded conveyance.

[2] 20 Fed. Rep. 584.

[3] Hilliard v. Cagle, 46 Miss. 309.

nevertheless be held to be fraudulent and void as to all creditors, existing and future, by evidence *aliunde* showing the conduct of the parties in their dealings in reference to the deed. The principal circumstances relied on in this case to avoid the deed were the facts that the grantor retained possession of the property, and that the deed was withheld from record. This enabled the mortgagor to contract debts upon the presumption that the property was unincumbered. The court said: "The natural and logical effect of the agreement and assignment, and the conduct of the parties thereto, was to mislead and deceive the public, and induce credit to be given to Baggett [the mortgagor], which he could not have obtained if the truth had been known, and therefore the whole scheme was fraudulent as to subsequent creditors, as much so as if it had been contrived with that motive and for that object."[1]

§ 237. Concealment in fraud of bankrupt act.—In Blennerhassett v. Sherman,[2] a very important case reviewing the authorities concerning suppression and concealment of transfers, the court held that a mortgage executed by an insolvent debtor with intent to give a preference to his creditors, was void under the bankrupt act. It appeared that the creditor had reasonable grounds to believe the mortgagor insolvent, and knew that the instrument was made in fraud of the provisions of the bankrupt act; and

[1] See Gill v. Griffith & Schley, 2 Md. Ch. Dec. 270. In this case the court decided that a party could not be permitted to take for his own security a bill of sale or mortgage of chattels from another, leaving the mortgagor at his request in possession and ostensibly the owner, and keep the public from a knowledge of the existence of the mortgage by withholding it from record for an indefinite period, renewing it periodically, and then receiving the benefit of the security by placing the last renewal upon record, to the prejudice of the other creditors who had trusted the debtor on the strength of the possession and ostensible ownership of the mortgaged property. The mortgage which was in controversy was declared void, and the decree was affirmed on appeal. See, further, Hafner v. Irwin, 1 Ired. (N. C.) Law 490; Worseley v. De Mattos, 1 Burr. 467; Tarback v. Marbury, 2 Vern. 510; Neslin v. Wells, 104 U. S. 428.

[2] 105 U. S. 100-121.

that the mortgagee had, for the purpose of evading the bankrupt law, actively concealed the existence of the instrument, and withheld it from record for a period of more than two months. The security was avoided, notwithstanding it was executed over two months before the filing of the petition in bankruptcy.[1]

§ 238. **Absolute conveyance by way of security.**—It is familiar learning that a deed absolute on its face may, despite the statute of frauds, be shown by extrinsic evidence to be a mortgage,[2] and that the relationship of mortgagee and mortgagor with all the usual incidents may thus be established. If, however, the transfer was not devised by the debtor to defraud or delay his creditors, or if it was so designed, and the trustee or mortgagee afforded no aid in carrying out the intention of the principal, the transaction is valid,[3] though perhaps open to suspicion.[4] A conveyance by way of security must be in all respects as clean and clear as a conveyance for permanent ownership.[5] If no fraud was in fact intended, the security may be enforced;[6] but if the debtor made a secret reservation,[7] or the creditor comes into court with a fraudulent claim of an absolute title,[8] other creditors may avoid the transaction.[9] Williams,

[1] The repeal of the Federal Bankrupt Act renders unimportant the consideration of cases arising exclusively under its provisions.

[2] Horn v. Keteltas, 46 N. Y. 605; Carr v. Carr, 52 N. Y. 251; Murray v. Walker, 31 N. Y. 399; McBurney v. Wellman, 42 Barb. (N. Y.) 390; s. c. *sub nomine* Dodge v. Wellman, 43 How. Pr. (N. Y.) 427; Odell v. Montross, 68 N. Y. 499; Hassam v. Barrett, 115 Mass. 256; Henley v. Hotaling, 41 Cal. 22; Sedg. and Wait on Trial of Title to Land, 2d ed., § 337; Gay v. Hamilton, 33 Cal. 686; French v. Burns, 35 Conn. 359; Clark v. Finlon, 90 Ill. 245; Butcher v. Stultz, 60 Ind. 170; McCarron v. Cassidy, 18 Ark. 34.

[3] Stevens v. Hinckley, 43 Me. 441; Reed v. Woodman, 4 Me. 400.

[4] Smith v. Onion, 19 Vt. 429.

[5] Phinizy v. Clark, 62 Ga. 623–627.

[6] Gaffney's Assignee v. Signaigo, 1 Dill. 158; Chickering v. Hatch, 3 Sumner 474; Smith v. Onion, 19 Vt. 427.

[7] Lukins v. Aird, 6 Wall. 78. See Oriental Bank v. Haskins, 3 Metc. (Mass.) 332.

[8] Thompson v. Pennell, 67 Me. 162.

[9] The law is settled in Alabama that an absolute conveyance of lands intended as security for a debt, or, in other words, designed to operate as a mortgage, is fraudulent and void as to existing creditors. The court say that the parties may not intend fraud, there

Ch. J., said in Barker v. French:[1] "Although it is true that a person may take security for a debt by a deed absolute, or by a bill of sale, when it was intended for security, yet there should be no disguise, nor dissembling, nor falsehood; and if the party claims an absolute purchase when the sale was only intended for security, and thereby seeks to protect from the creditors the property of the vendor, and endeavors to conceal the true nature of the transaction, it is evidence of fraud." Probably the weight of the better authority and the sounder reasoning is to the effect that an absolute conveyance by way of security is a badge of fraud which may be removed by evidence of an honest intent.[2] It may be noted with reference to the law upon this subject, that an absolute conveyance by way of security affords a convenient and tempting cover for fraud upon creditors, and the tendency to regard transactions of this kind with suspicion should be encouraged. Where the security is corrupted with fraud, not only can creditors secure it to be avoided, but, as is elsewhere shown, the parties themselves can get no relief.[3]

§ 239. **Insolvency.**—Insolvency, as we have seen, does not deprive the owner of the power to sell his property,[4] to pay his debts, whether to one or more of his creditors.[5] Indebtedness or hopeless insolvency is, however, an im-

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may be no actual intent to hinder, delay, or defraud creditors, yet, because such is its inevitable consequence, the law condemns it. Sims v. Gaines, 64 Ala. 396. See Bryant v. Young, 21 Ala. 264; Hartshorn v. Williams, 31 Ala. 149. To the same general effect, see Ladd v. Wiggin, 35 N. H. 426, and cases cited. Compare Prescott v. Hayes, 43 N. H. 593; Chenery v. Palmer, 6 Cal. 122.

[1] 18 Vt. 460.

[2] Ross v. Duggan, 5 Col. 100; Stevens v. Hinckley, 43 Me. 440; Emmons v. Bradley, 56 Me. 333; Moore v. Roe, 35 N. J. Eq. 90. See Gibson v. Seymour, 4 Vt. 522; Columbia Bank v. Jacobs, 10 Mich. 349; Harrison v. Trustees of Phillips Academy, 12 Mass. 456.

[3] Hassam v. Barrett, 115 Mass. 258.

[4] Singer v. Goldenburg, 17 Mo. App. 549.

[5] Crawford v. Kirksey, 50 Ala. 591; Stover v. Herrington, 7 Ala. 142. See §§ 52, 95. Insolvency of a corporation does not necessarily entitle stockholders to secure a receiver. Denike v. N. Y. & Rosendale Lime & Cement Co., 80 N. Y. 599. Wait on Insolv. Corps. § 178.

portant element of proof in marshalling badges of fraud to overturn a covinous transaction.[1] The distinction between the right of existing and subsequent creditors which, of course, has an important bearing upon this subject,[2] is elsewhere considered. The conveyance, to be fraudulent, should bear such a ratio to the indebtedness as to tend directly to defeat the claims of creditors.[3] A heavy indebtedness of the grantor, together with a sale to a relative, of necessity form strong badges or indications of collusion and fraud, but are not in themselves, unsupported by other material facts, deemed conclusive proofs of fraud.[4] Again, it is said that insolvency of the grantor, although a circumstance which may be taken, together with other material facts, to show a fraudulent design in disposing of property, is not regarded as sufficient of itself to establish it.[5] The sale of all the effects of an insolvent copartnership upon credit at a fair valuation, to a responsible vendee who knew of the insolvency, is not *per se* fraudulent;[6] nor does proof of a sale upon credit, by a party in failing circumstances, to one who had knowledge of these circumstances, necessarily establish fraud.[7]

§ 240. **Sales upon credit.**—It must be remembered that every delay to which a creditor is subjected in the collection of his debt is not necessarily fraudulent.[8] Insolvency, as is elsewhere shown, does not deprive a debtor of the right to sell his property;[9] and if the sale is made in good

[1] Hudgins v. Kemp, 20 How. 45; McRea v. Branch Bank of Alabama, 19 How. 377; Bibb v. Baker, 17 B. Mon. (Ky.) 292; Bulkley v. Buffington, 5 McLean 457; Purkitt v. Polack, 17 Cal. 327; Hartshorn v. Eames, 31 Me. 93; Ringgold v. Waggoner, 14 Ark. 69; Blodgett v. Chaplin, 48 Me. 322; Clark v. Depew, 25 Pa. St. 509; Barrow v. Bailey, 5 Fla. 9. Compare Cox v. Fraley, 26 Ark. 20; State *ex rel.* Peirce v. Merritt, 70 Mo. 277; Fuller v. Brewster, 53 Md. 358.

[2] See Chaps. V., VI.

[3] Clark v. Depew, 25 Pa. St. 509.

[4] Merrill v. Locke, 41 N. H. 490.

[5] Leffel v. Schermerhorn, 13 Neb. 342.

[6] Ruhl v. Phillips, 48 N. Y. 125; S. C. 8 Am. Rep. 522.

[7] Loeschigk v. Bridge, 42 N. Y. 421.

[8] Loeschigk v. Bridge, 42 Barb. (N. Y.) 173; affi'd 42 N. Y. 421.

[9] See § 52.

faith, and without any intent to hinder, delay, or defraud creditors, the mere fact that it was made upon credit does not require that it should be declared invalid. The court in Roberts v. Shepard[1] said: "A sale upon credit of part of their property, by an insolvent firm, is a circumstance which may be considered, with others, bearing upon the question of fraudulent intent, but alone does not necessarily establish it." Certainly it will not do to say that the law presumes that every man who sells on credit does so with intent to hinder and delay his creditors.[2] In Ruhl v. Phillips[3] the New York Commission of Appeals, reversing the court below,[4] held that the sale of the entire effects of an insolvent copartnership at a fair valuation, upon a credit ranging from four to twenty-four months, to a responsible vendee, having knowledge of the insolvency, was not fraudulent *per se*. In the New York Court of Appeals[5] the principle is enunciated that the mere fact of a sale of his property by a party in failing circumstances, to a purchaser having knowledge of his condition, upon an average credit of sixteen months, did not *per se* establish fraud, or an intent to hinder or delay creditors.[6] Where, however, it appears upon the face of the transaction that the parties contemplated a large surplus, and the property is practically protected from forced sales or attachments or levies for two years, the instrument will be declared void as hindering and delaying creditors.[7]

§ 241. **Unusual acts and transactions.**—Courts and juries are often influenced in favor of creditors by slight circumstances connected with the transaction indicating excessive efforts to give the conveyance the appearance of fairness, or by facts which are not the usual attendants of business

[1] 2 Daly (N. Y.) 112.
[2] Gillet v. Phelps, 12 Wis. 399.
[3] 48 N. Y. 125.
[4] 2 Daly (N. Y.) 45.
[5] Loeschigk v. Bridge, 42 N. Y. 421.
[6] Compare Brinley v. Spring, 7 Me. 241; Harris v. Burns, 50 Cal. 140; Lewis v. Caperton, 8 Gratt. (Va.) 148.
[7] Bigelow v. Stringer, 40 Mo. 195. Compare Reynolds v. Crook, 31 Ala. 634.

transactions. Honesty requires no stratagem or subterfuge to support and aid it.[1] In Adams v. Davidson[2] the assignee took a fellow clerk with him to witness an attempted transfer of possession, and requested him to "pay attention and recollect what he heard." The court were plainly influenced by the evidence of this request, and observed that it was wholly unnecessary if the parties intended to comply with the exactions of good faith in taking and holding possession of the property assigned. To a similar effect is the case of Hartshorn v. Eames.[3] In that case the court said that there was no indication of great formality in transacting business between the parties, except on the occasion in question, when great precision was resorted to; an accurate calculation and valuation gone into, and the claim of the grantee made to overbalance the valuation. These with other facts led the court to believe that the transaction resembled a farce rather than a *bona fide* transaction. Again it is said that "*bona fide* transactions do not need to be clothed with the extraordinary pretence of prompt payment."[4] In Langford v. Fly,[5] the deed of gift contained this clause: "Now this indenture is not to hinder or delay the collection of any of my just debts, but the same are to be paid." A suit for slander was pending at the time. The court said that this clause was evidently the result of a consciousness on the part of the assignor that others might think the deed was made with a fraudulent design, and, as he was otherwise free from debt, it indicated that his purpose in making the transfer was to defeat the judgment which might possibly be recovered in the action for slander.[6] "Studied for-

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[1] Comstock v. Rayford, 20 Miss. 391.
[2] 10 N. Y. 309, 312.
[3] 31 Me. 100.
[4] King v. Moon, 42 Mo. 551, 561.
[5] 7 Humph. (Tenn.) 587.
[6] In Mead v. Noyes, 44 Conn. 491, "the parties took the precaution to go through with the formality of procuring, executing, and delivering a bill of sale of the property; conduct unusual in respect to property of this character where the sale is honestly made." This

mality and apparent fairness" will not save a fraudulent transaction.[1] In Crawford v. Kirksey[2] it was contended by counsel that very great and unusual particularity furnished badges of fraud.[3] The court observed that if the transaction was consummated quietly and without witnesses, then the complaint would be that it was secretly effected. If unusual publicity or particularity characterized the transaction this would be urged as a badge of fraud. This it was said savored of the water test which in former years was applied to those suspected of witchcraft. If they sank they were innocent, but they incurred great hazard of losing their lives by drowning; if they swam they were adjudged witches and perished at the stake.

It may be observed that the absence of memoranda, or of any record of the consideration;[4] the failure to take an account of the stock, and no agreement as to the exact terms of settlement;[5] a false admission of the receipt of the consideration;[6] unusual clauses in the instrument;[7] a sale to a creditor without a surrender of the evidence of indebted-

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was regarded as one of the circumstances attending the sale which tended strongly to show the existence of actual fraud.

[1] First Nat. Bank v. Knowles, 67 Wis. 385.

[2] 55 Ala. 300.

[3] The facts in Lake v. Morris, 30 Conn. 204, afford illustration of the general subject. The vendee was in actual possession of the property purchased. Hence counsel contended that the sale was void because there had been no actual delivery of possession. The court in overruling the argument, said: "No such delivery could have taken place without first taking the horses from the plaintiff's possession for the mere purpose of redelivering them to him again. But a merely formal act like this we presume would never occur between parties whose only object was to place the purchased property in the hands of the purchaser for his use. The act, therefore, would rather be evidence of caution, like the direction sometimes given to scriveners to draw up strong writings, which, to say the least, would furnish as much ground to suspect the honesty of a transaction as it would evidence of its *bona fides*."

[4] Hubbard v. Allen, 59 Ala. 300; Alexander v. Todd, 1 Bond 179.

[5] Wheelden v. Wilson, 44 Me. 20.

[6] Alexander v. Todd, 1 Bond 180; Balto. & O. R.R. Co. v. Hoge, 34 Pa. St. 214; Watt v. Grove, 2 Sch. & Lef. 501.

[7] Pilling v. Otis, 13 Wis. 496; Gibbs v. Thompson, 7 Humph. (Tenn.) 179.

ness;[1] a sale not conducted in the "usual and ordinary course of business";[2] conduct of the parties which is "exceptional and peculiar";[3] a conveyance of real estate without adequate security;[4] absence of authentic evidence of indebtedness, considerable in amount, other than a pencil memorandum;[5] contradictory and irreconcilable accounts of the transaction given by the vendor and vendee;[6] receiving the rents and managing the estate by the vendor after the alleged sale, under an assumed agency from the vendee, but without any evidence of a genuine agency other than the uncorroborated assertion of the party;[7] absence of means in the vendee;[8] preparation of the deed at the sole instance of the grantee;[9] leaving the business sign the same;[10] employment of the vendor after the sale;[11] sacrificing property for one-fourth of its value;[12] deeding property to relatives without their knowledge;[13] concealment;[14] absence of evidence which is supposed to be within the reach of the party charged with the fraudulent act;[15] neglect to testify;[16] destruction of letters relating to the contro-

[1] Gardner v. Broussard, 39 Tex. 372; Webb v. Ingham, 29 W. Va. 389.

[2] State *ex rel.* Peirce v. Merritt, 70 Mo. 283.

[3] Brinks v. Heise, 84 Pa. St. 253; Gollober v. Martin, 33 Kans. 255.

[4] Owen v. Arvis, 26 N. J. Law 32.

[5] Brinks v. Heise, 84 Pa. St. 253.

[6] Marshall v. Green, 24 Ark. 419.

[7] Sands v. Codwise, 4 Johns. (N. Y.) 536.

[8] Danby v. Sharp, 2 MacAr. (D. C.) 435; Stevens v. Dillman, 86 Ill. 233. See Castle v. Bullard, 23 How. 186. In Morford v. Dieffenbacker, 54 Mich. 593, 607, Cooley, C. J., said: "A sale to a person without means when ready money was the nominal purpose, must necessarily be suspicious."

[9] Sears v. Shafer, 1 Barb. (N.Y.) 408.

[10] Danby v. Sharp, 2 MacAr. (D. C.) 435; Wright v. McCormick, 67 Mo. 430.

[11] McKibbin v. Martin, 64 Pa. St. 352; Hurlburd v. Bogardus, 10 Cal. 518; Rothgerber v. Gough, 52 Ill. 438. See Bird v. Andrews, 40 Conn. 542.

[12] Stevens v. Dillman, 86 Ill. 235.

[13] Lavender v. Boaz, 17 Bradw. (Ill.) 421.

[14] Hoffer v. Gladden, 75 Ga. 538.

[15] Newman v. Cordell, 43 Barb. (N. Y.) 448–461; Peebles v. Horton, 64 N. C. 374.

[16] Graham v. Furber, 14 C. B. 410; Goshorn v. Snodgrass, 17 W. Va. 770; Henderson v. Henderson, 55 Mo. 559. See Harrell v. Mitchell, 61 Ala. 270. "The omission of Johnson to testify as a witness for himself, in reply to the evidence against him, is of great weight." Bowden v. Johnson, 107 U. S. 262. See Clark v. Van Riemsdyk, 9 Cranch 153; Clements v. Moore, 6 Wall. 299; Hoffer v. Gladden, 75 Ga. 538. But see Clark v. Krause, 2 Mackey (D. C.) 570.

versy ;[1] tendering security without solicitation ;[2] transfers professedly to prevent the sacrifice of the property ;[3] taking additional security by way of chattel mortgage on a claim already secured by mortgage on real estate ;[4] extending unusual credit ;[5] all these are *indicia* of fraud upon creditors proper for the consideration of the jury, or of a court of equity, in cases where a jury trial is not had.

On the other hand, a purchase of land by an attorney without making an abstract of title is not necessarily evidence of fraud ;[6] nor is a sale by an insolvent of his whole stock in trade upon credit always covinous,[7] though it is circumscribed by fraudulent presumptions. It has been even held that evidence of a sale by a party indebted, of an uninventoried stock of goods, on credit, to a near relative, failed to establish fraud ; nor is a trust void because not particularly declared.[8] Then the fact that the purchaser has no use for the property is not evidence of fraud.[9] The want of minute accuracy of language, and the disregard of the usual forms, will not render an assignment void,[10] nor is it affected by a failure to file schedules,[11] nor by the failure to record it for a few days.[12] Giving more security than is necessary is not itself an indication of fraud.[13]

In a Massachusetts case it was decided that a party was not entitled to offer the testimony of witnesses to the effect "that the giving of a mortgage, such as the mortgage in question, would not be in the usual and ordinary course of such business." That was considered to be the question for the jury to decide.[14]

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[1] Burke v. Burke, 34 Mich. 455.

[2] Kellogg v. Root, 23 Fed. Rep. 525.

[3] German Ins. Bank v. Nunes, 80 Ky. 334.

[4] Crapster v. Williams, 21 Kans. 109.

[5] Cowling v. Estes, 15 Bradw. (Ill.) 260.

[6] Jenkins v. Einstein, 3 Biss. 129.

[7] Scheitlin v. Stone, 43 Barb. (N. Y.) 634, Sutherland, J., dissenting.

[8] Forbes v. Scannell, 13 Cal. 287.

[9] Grubbs v. Greer, 5 Coldw. (Tenn.) 548.

[10] Meeker v. Saunders, 6 Iowa 67. Compare State v. Keeler, 49 Mo. 548.

[11] Produce Bank v. Morton, 67 N. Y. 203. See Brennan v. Wilson, 1 Am. Insolv. Rep. 77.

[12] Hoopes v. Knell, 31 Md. 553.

[13] Colbern v. Robinson, 80 Mo. 541.

[14] Buffum v. Jones, 144 Mass. 29, 31.

§ 242. **Effect of relationship upon debtor's transactions.**— It is said by the Supreme Court of Pennsylvania that "there is no law prohibiting persons, standing in near relations of business or affinity, from buying from each other; or requiring them to conduct their business with each other in special form."[1] The sale of property by a father to his son, or by the son to his father, cannot in itself be considered as a badge of fraud,[2] and sometimes the strongest considerations of duty may prompt a son to prefer the claim of a widowed mother.[3] "The relationship of assignor and assignee," says Finch, J., "and their intimacy and friendship, and the preference given to the latter as a creditor prove nothing by themselves. They are consistent with honesty and innocence, and become only important when other circumstances, indicative of fraud, invest them with a new character and purpose, and transform them from equivocal and ambiguous facts into positive badges of fraud."[4] Relationship of the parties, however, is calculated to awaken suspicion,[5] and the transaction will be closely scrutinized,[6] though the relationship is not of itself sufficient

[1] Dunlap v. Bournonville, 26 Pa. St. 73. See Reehling v. Byers, 94 Pa. St. 323. See McVicker v. May, 3 Pa. St. 224; Forsyth v. Matthews, 14 Pa. St. 100; Bumpas v. Dotson, 7 Humph. (Tenn.) 310; Shearon v. Henderson, 38 Tex. 250; Wilson v. Lott, 5 Fla. 305; Bowman v. Houdlette, 18 Me. 245; Tyberandt v. Raucke, 96 Ill. 71; Pusey v. Gardner, 21 W. Va. 477; Lininger v. Herron, 18 Neb. 452.

[2] Shearon v. Henderson, 38 Tex. 251; Fleischer v. Dignon, 53 Iowa 288; Wheelden v. Wilson, 44 Me. 11; S. P. Demarest v. Terhune, 18 N. J. Eq. 49; Low v. Wortman, 44 N. J. Eq. 193.

[3] Coley v. Coley, 14 N. J. Eq. 350.

[4] Shultz v. Hoagland, 85 N. Y. 468; S. P. Clark v. Krause, 2 Mackey (D. C.) 566. See Renney v. Williams, 89 Mo. 145.

[5] Bumpas v. Dotson, 7 Humph. (Tenn.) 310; Forsyth v. Matthews, 14 Pa. St. 100; Harrell v. Mitchell, 61 Ala. 271; Engraham v. Pate, 51 Ga. 537; Sherman v. Hogland, 73 Ind. 473; Moog v. Farley, 79 Ala. 246.

[6] Marshall v. Croom, 60 Ala. 121; Fisher v. Shelver, 53 Wis. 501; Seitz v. Mitchell, 94 U. S. 580; Simms v. Morse, 4 Hughes 582; Fisher v. Herron, 22 Neb. 185; Bartlett v. Cheesbrough, 23 Neb. 771. Mr. May says: "A settlement or other conveyance in favor of a near relative is open to more suspicion than one to a mere stranger, inasmuch as it is more likely to be intended, not as a real transfer of property by which the donor puts it out of his own reach, but a feigned and collusive arrangement by which it is secretly understood that the donee shall hold

to raise a presumption of fraud.[1] It may be considered, with the other facts, by the jury,[2] and rather tends to aid the creditors,[3] for it is regarded as highly probable that a party intending to perpetrate a fraud, would look for aid and connivance to a relative rather than to a stranger. When relationship is coupled with secrecy in the transaction, it may, unless explained or justified, be regarded as fraudulent.[4] The same rule applies when the transfer conveys the debtor's entire estate, and other badges accompany it.[5] It may be observed here that the fact that the creditors who obtained judgments by confession bore intimate relations to the debtors, the delay in the levy of the execution, the unusual time and order under which the assignee took possession, and the agency of the same attorney in all the proceedings, though, perhaps, casting suspicion upon the proceedings, are not in themselves sufficiently strong to sustain an imputation of bad faith, or a charge of fraudulent preference.[6] We may here advert to the rule of the common law that a debtor has a right to prefer one class of creditors to another, and that it is error "to encourage a jury to take into consideration the exercise of this right as 'a circumstance of suspicion' in deciding upon the fairness of the transfer."[7]

The case of Salmon v. Bennett[8] has exerted a potent influence over decisions in this country concerning voluntary conveyances. In the course of the opinion Swift, C. J., said:[9] "Mere indebtedness at the time will not, in all cases, render a voluntary conveyance void as to creditors, where

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the property against the claims of creditors or purchasers, and still let the donor receive benefits from it." May's Fraudulent Conveyances, p. 236.

[1] King v. Russell, 40 Tex. 132; Marshall v. Croom, 60 Ala. 121.

[2] Engraham v. Pate, 51 Ga. 537; Burton v. Boyd, 7 Kans. 17.

[3] Demarest v. Terhune, 18 N. J. Eq. 49.

[4] Reiger v. Davis, 67 N. C. 189.

[5] Embury v. Klemm, 30 N. J. Eq. 523; Johnston v. Dick, 27 Miss. 277.

[6] Baldwin v. Freydendall, 10 Bradw. (Ill.) 107.

[7] Born v. Shaw, 29 Pa. St. 292.

[8] 1 Conn. 525. See 24 Am. Law Reg. N. S. 496.

[9] Salmon v. Bennett, 1 Conn. 525, 542.

it is a provision for a child in consideration of love and affection; for if all gifts by way of settlement to children, by men in affluent and prosperous circumstances, were to be rendered void upon a reverse of fortune, it would involve children in the ruin of their parents, and in many cases might produce a greater evil than that intended to be remedied." This rule has been applied to conveyances to wives,[1] as well as to children,[2] grandchildren,[3] and other near relatives.[4]

§ 243. **Prima facie cases of fraud.**—Taking a deed for property in the name of the wife, which property was purchased and paid for by the husband, who was involved in debt at the time, was said to make a *prima facie* case of fraud against creditors.[5] In Purkitt v. Polack[6] the court observed: "The control of the property after the alleged sale, the indebtedness of the grantor at the time, the absence of the grantee from the State, and the failure on the part of the latter to show any payment of consideration,

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[1] See Clayton v. Brown, 17 Ga. 217; s. c. again 30 Ga. 490; Weed v. Davis, 25 Ga. 684; Goodman v. Wineland, 18 Reporter (Md.) 622; Kipp v. Hanna, 2 Bland Ch. (Md.) 26; Filley v. Register, 4 Minn. 391; Walsh v. Ketchum, 12 Mo. App. 580; Patten v. Casey, 57 Mo. 118; Potter v. McDowell, 31 Mo. 62; Ammon's Appeal, 63 Pa. St. 284; Carl v. Smith, 8 Phila. (Pa.) 569; Perkins v. Perkins, 1 Tenn. Ch. 537; Yost v. Hudiburg, 2 Lea (Tenn.) 627; Morrison v. Clark, 55 Texas 437; Belt v. Raguet, 27 Texas 471; Smith v. Vodges, 92 U. S. 183; Lloyd v. Fulton, 91 U. S. 479; French v. Holmes, 67 Me. 186; Winchester v. Charter, 12 Allen (Mass.) 606.

[2] See Dodd v. McCraw, 8 Ark. 83; Smith v. Yell, 8 Ark. 470; Clayton v. Brown, 17 Ga. 217; Patterson v. McKinney, 97 Ill. 41; Worthington v. Bullitt, 6 Md. 172; Worthington v. Shipley, 5 Gill (Md.) 449; Smith v. Lowell, 6 N. H. 67; Brice v. Myers, 5 Ohio 121; Crumbaugh v. Kugler, 2 Ohio St. 373; Grotenkemper v. Harris, 25 Ohio St. 510; Miller v. Wilson, 15 Ohio 108; Posten v. Posten, 4 Whart. (Pa.) 27; Chambers v. Spencer, 5 Watts (Pa.) 404; Mateer v. Hissim, 3 P. & W. (Pa.) 160; Burkey v. Self, 4 Sneed (Tenn.) 121; Hinde's Lessee v. Longworth, 11 Wheat. 199; Brackett v. Waite, 4 Vt. 389; s. c. 6 Vt. 411; Church v. Chapin, 35 Vt. 223; Lerow v. Wilmarth, 9 Allen (Mass.) 386; Laughton v. Harden, 68 Me. 208; Stevens v. Robinson, 72 Me. 381.

[3] Bird v. Bolduc, 1 Mo. 701; Williams v. Banks, 11 Md. 198.

[4] Pomeroy v. Bailey, 43 N. H. 118. See 24 Am. Law Reg. N. S. 497.

[5] Alston v. Rowles, 13 Fla. 117.

[6] 17 Cal. 327–332.

were amply sufficient to raise a *prima facie* intendment of fraud in the transaction." In Reiger v. Davis[1] the court remarked that when a much-embarrassed debtor conveyed property of great value to a near relative, and the transaction was secret, no one being present to witness it but relatives, it was to be regarded as fraudulent. In Wilcoxen v. Morgan[2] the court said that in addition to the evidence of certain declarations made at the time of the preparation of the conveyance, "the relationship of the parties; the fact that the conveyance was made without the knowledge of the grantee; the absence of consideration, and the subsequent long-continued possession and dominion of the premises by the grantor, sufficiently manifest that the purpose of G. in this conveyance was to put the estate beyond the reach of his creditors." When it appeared that after the conveyance the debtor had no other property subject to execution, that the grantee was his brother and had not means sufficient to enable him to pay for the property, that the debtor remained in possession and the grantee removed out of the State, these, and certain admissions of the covinous nature of the transfer, were considered sufficient to show that the conveyance was made to protect the property from creditors.[3] In Danby v. Sharp[4] it is said that a sale of an entire stock-in-trade to a clerk in the employment of the vendor, is colorable and fraudulent as to the creditors of the vendor, when the vendee has no means, except that he receives ten dollars a week for his services, and where he pays nothing at the time of the sale, but gives his unsecured promissory notes for the whole amount of the purchase-money, and no public notice is given of the change, but the business sign remains the same, and the vendor is frequently about the premises. In Moore v. Roe[5] the court held that the transfer of all a debtor's prop-

[1] 67 N. C. 186.
[2] 2 Col. 477, 478.
[3] McDonald v. Farrell, 60 Iowa 337.
[4] 2 MacAr. (D. C.) 435.
[5] 35 N. J. Eq. 90.

erty pending a suit against him; the taking of an absolute deed as security for money owing by the debtor, and looseness or incorrectness in stating the consideration of the conveyance, or in determining the value of the property conveyed, were indications of fraud.

The further multiplication of these illustrations is a work of doubtful utility. Indeed the resources of fraudulent debtors are too great, the color and variety of the devices to elude creditors too numerous, to render classification of the different schemes practicable. It is to be noticed that the illustrations last given combine different badges of fraud, and it is very common in creditors' suits to find many of these *indicia* existing in a single case.

§ 244. **Comments.**—Frequent comment is made upon the extreme difficulty of the task of defining and establishing fraud, and it seems to be regarded as impossible to formulate exact rules as to what is and what is not fraud. "To do so would be to give to persons fraudulently inclined the power of evading the jurisdiction of the courts by fresh contrivances which might be invented to elude any invariable, inflexible rule."[1] "As to relief against frauds," says Hardwicke, "no invariable rules can be established. Fraud is infinite, and were a court of equity once to lay down rules how far they would go, and no further, in extending their relief against it, or to define strictly the species or evidence of it, the jurisdiction would be cramped and perpetually eluded by new schemes, which the fertility of man's invention would contrive." Vice-Chancellor Kindersley expressed the modern doctrine in these terms: "It was at one time attempted to lay down rules that particular things were indelible badges of fraud, but in truth, every case must stand upon its own footing, and the court or the jury must consider whether, having regard to all the cir-

[1] May's Fraudulent Conveyances, p. 80; Parke's History of Court of Chancery, p. 508. See § 13 and note.

cumstances, the transaction was a fair one, and intended to pass the property for a good and valuable consideration."[1] In Jones v. Nevers,[2] Allen, C. J., said: "Every case must stand on its own footing." But this leads to unsatisfactory and uncertain results. The profession are not given sufficient fixed rules with which to guide their actions, or advise clients, and must resort to the wilderness of single instances contained in the reports to discover analogous cases. The courts protest that it is not permissible to guess at the truth in the discovery of fraud; that fraud must be proved and not presumed, and that speculative inferences are not the proper foundation of a legal judgment.[3] Yet the most casual reading of many reported decisions will demonstrate that transfers of property have been avoided, especially in equity, upon the most shadowy and intangible grounds, and that in many instances innocent purchasers have been the victims of unfortunate circumstances. That on the other hand, fraudulent alienees have constantly escaped the meshes of the law, and secured their ill-gotten gains, though the defrauded creditors were inwardly conscious of the fraud which they were powerless to prove, is a matter of common experience. The impulse "to color more strongly the constructive indications of fraud, for the protection of valuable rights," is to be encouraged. The degrees of weight to be attached to particular classes of *indicia* should be carefully considered, for, in the present aspect of the law, the marks of fraud, which assume such prominence in this class of litigation, often, like a two-edged sword, injure both creditors and *bona fide* alienees.

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[1] Hale v. Metropolitan Omnibus Co., 28 L. J. Ch. 777.

[2] 18 New Brunsw. 629.

[3] See §§ 5, 6.

CHAPTER XVII.

CHANGE OF POSSESSION—DELIVERY.

§ 245. Concerning possession.
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"By the possession of a thing we always conceive the condition in which not only one's own dealing with the thing is physically possible, but every other person's dealing with it is capable of being excluded."—*Von Savigny's Treatise on Possession*, translated by Sir Erskine Perry, p. 2.

§ 245. **Concerning possession.**—Possession, or "the owning or having a thing in one's own power,"[1] with the right to deal with it at pleasure, to the exclusion of others,[2] is said to be a degree of title, although the lowest.[3] The effect of a failure to change possession, more especially as relating to sales of personalty, will be found upon investigation to occupy a very prominent place in the law regulating fraudulent conveyances. Indeed, some of the writers seem to lose sight of the other characteristics of Twyne's

[1] Brown v. Volkening, 64 N. Y. 80. Compare Pope v. Allen, 90 N. Y. 298.

[2] Sullivan v. Sullivan, 66 N. Y. 41.

[3] Swift v. Agnes, 33 Wis. 240; Rawley v. Brown, 71 N. Y. 85; Mooney v. Olsen, 21 Kans. 691.

Case,[1] and treat the question of the failure to change possession of the property as not only the controlling but the exclusive feature of the case. In Twyne's Case[2] the court said: "The donor continued in possession and used the goods as his own, and by reason thereof he traded and trafficked with others, and defrauded and deceived them."[3] Hence Coke, in commenting upon this case, gives the following advice to a donee: "Immediately after the gift take possession of the goods, for continuance of possession in the donor is a sign of trust." It will be at once manifest from this statement that the modern law upon the subject must have undergone a very material change since Coke wrote, for the failure to consummate the sale or gift by change of possession was then considered to be merely a mark, sign, or badge of fraud.[4] We cannot but regard this feature of the law as occupying too prominent a place, and as receiving too great attention as applied to transactions which it is sought to annul as fraudulent under the statute of Elizabeth.[5] The theory is, that a sale or gift unaccompanied by possession is not apparent to third parties, but on the contrary is contradicted by the continued visible possession of the vendor. Yet, in the case of bailments in their many forms, the possession is held by parties who are not the owners, but this feature of the relationship is not

[1] See § 22.

[2] 3 Rep. 80, 81*a*.

[3] See Putnam v. Osgood, 52 N. H. 156; Wright v. McCormick, 67 Mo. 430; Barr v. Reitz, 53 Pa. St. 256; Manton v. Moore, 7 T. R. 72; also Twyne's Case, 1 Smith's Lea. Cas. 1; "Sales and Conveyances without Delivery of Possession," 18 Am. Law Reg. (N. S.) 137. See § 22.

[4] "The statute does not introduce a new rule, nor does it make a forced or unnatural presumption. The direct tendency of a conveyance of goods without a change of possession is to deceive and to defraud creditors and purchasers; and the law always presumes, even in criminal matters, that a person intends whatever is the natural and probable consequence of his own actions." Griswold v. Sheldon, 4 N. Y. 593. For exceptions to the general rule see Bissell v. Hopkins, 3 Cow. (N. Y.) 166, *in notis*.

[5] In Davis v. Turner, 4 Gratt. (Va.) 441, the court observed: "The truth is, there is something rather loose and indefinite in the idea of a delusive credit gained by the possession of personal property."

regarded as giving rise to any presumption of fraud. Any one can safely put his personal property in another's possession, or give another the use of it, without imperilling his title.[1] It is said that "the possession of property never owned by the possessor raises no . . . . presumption" of ownership.[2] This surely is an unsatisfactory explanation of the distinction. The acts of ownership exercised over property by a bailee and by an owner, either before or after sale, are not necessarily dissimilar. Inquiry in either case would generally be necessary to ascertain the status of the title. The exercise of these very acts of ownership constitute the mischief sought to be obviated by the rule calling for change of possession. Chattels are not negotiable. Possession is not, as in the case of mercantile paper and money, an assurance of title, or of authority or power of disposition. "The servant," said Woodruff, J., "intrusted with the possession of his master's property, does not thereby get authority to sell it, or to authorize another to sell it. The borrower of a chattel, or the ordinary bailee, does not, by his possession, gain any such power."[3] A man cannot be deprived of his property without his consent.

Surely it is obvious that to prohibit altogether the separation of the title from the possession of personal property would be incompatible with an advanced state of society and commerce, and productive of great inconvenience and

[1] Capron v. Porter, 43 Conn. 389. Dillon, J., observes, that "the rule, deducing fraud as a conclusion of law from the simple retention of possession by the vendor or mortgagor, originated in England in a very early day, when there were no registry laws, or none requiring *such* instruments to be registered. It was founded upon public policy. That policy was to prevent a party from acquiring a false and deceptive credit on the strength of the possession of property which he had sold or mortgaged, and yet of which he retained the possession, enjoyment, and apparent ownership. The statute of 13 Elizabeth did not declare that such retention would be fraudulent. This was a doctrine of the courts." Hughes v. Cory, 20 Iowa 402. See Bullock v. Williams, 16 Pick. (Mass.) 33.

[2] Capron v. Porter, 43 Conn. 389. See Davis v. Bigler, 62 Pa. St. 242.

[3] Spraights v. Hawley, 39 N. Y. 446.

injustice in the pursuits and business of life.[1] It would be "a remedy worse than the disease."

§ 246. **Change of possession.**—It is believed that the rule of the common law had its foundation in the doctrine already noticed, that possession of personal property is *prima facie* evidence of ownership. To allow the owner of such property to transfer the title by a secret conveyance, while retaining the possession and assuming to act as the owner, was regarded as permitting a fraud upon all persons who should deal with him upon the faith of his ownership. As we have said, the theory was that his possession and apparent ownership gave him credit, and afforded him the means of defrauding others.[2] An agreement to let a vendor retain the possession and use of the property after an absolute sale is not considered to be a common and ordinary transaction in the usual course of business. Such an arrangement, it is urged, excites suspicion, and it is regarded in many of the cases as the bounden duty of the courts, for the safety and protection of creditors, to call upon and hold the vendee in all such cases, to explain clearly and satisfactorily how an absolute sale could have been *bona fide*, and yet the vendor retain the use and possession.[3]

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[1] Davis v. Turner, 4 Gratt. (Va.) 441.

[2] See Crooks v. Stuart, 2 McCrary, 15. "The controlling argument, ... is the danger of false credit and fraudulent evasion of debt whenever delivery and change of possession do not accompany and follow change of property whether absolute or qualified," per Verplanck, Senator, in Cole v. White, 26 Wend. (N. Y.) 523. Chief-Justice Kent said, in Sturtevant v. Ballard, 9 Johns. (N. Y.) 337, 339: "Delivery of possession is so much of the essence of the sale of chattels that an agreement to permit the vendor to keep possession is an extraordinary exception to the usual course of dealing, and requires a satisfactory explanation." Again it is observed: "Retention of possession not only tends to give false credit to the seller, but it is a sign of a secret trust in his favor." Brawn v. Keller, 43 Pa. St. 106.

[3] Coburn v. Pickering, 3 N. H. 427. It must be remembered that, by the common law, delivery was not considered necessary upon a sale of chattels to vest the title in the vendee, (Miller *ads.* Pancoast, 29 N. J. Law 253; Frazier v. Fredericks, 24 N. J. Law 169; Meeker v. Wilson, 1 Gall. 424; Monroe v. Hussey, 1 Oreg. 190; Davis v.

Such is the general condition of the law relating to this branch of the subject, whatever may be the force of the criticisms suggested. The subject by reason of its prominence calls for consideration somewhat in detail, and for a discussion of the many exceptions, real and apparent, to the general rule arising from the necessities incident to particular cases and from other causes.[1]

§ 247. **Possession as proof of fraud.**—As we shall presently show, it is commonly stated in some of the reports that the continued possession of the subject-matter of the sale by the grantor or vendor is *prima facie* evidence of fraud, while other authorities regard it as conclusive proof that the transaction is covinous. A learned writer[2] has de-

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Turner, 4 Gratt. [Va.] 426,) as between the parties. Philbrook v. Eaton, 134 Mass. 398, 400; Parsons v. Dickinson, 11 Pick. (Mass.) 352; Packard v. Wood, 4 Gray (Mass.) 307.

[1] Mr. May says in his treatise on Fraudulent Conveyances, 2d ed., p. 118: "It by no means follows, though, that because there is no possession given therefore a transfer is fraudulent; for those cases where the judges have said that if possession was not given it was fraudulent (Edwards v. Harben, 2 T. R. 587; Wordall v. Smith, 1 Campb. 332; Macdona v. Swiney, 8 Ir. C. L. R. 86) must be taken with reference to the circumstances of each case. The question of possession is one of much importance, but that is with a view to ascertain the good or bad faith of the transaction (Abbott, C. J., in Latimer v. Batson, 4 B. & C. 652; and see Arundell v. Phipps, 10 Ves. 139; Kidd v. Rawlinson, 2 B. & P. 59; Hoffman v. Pitt, 5 Esp. 22, 25; Eastwood v. Brown, Ry. & Mood. 312). In Arundell v. Phipps (10 Ves. 139, 145), Lord Eldon said that the mere circumstance of the possession of chattels, however familiar it might be to say that it proves fraud, amounts to no more than that it is *prima facie* evidence of property in the man possessing, until a title not fraudulent is shown under which that possession has followed; that every case, from Twyne's Case (3 Rep. 80 b; see the remarks of Littledale, J., in Martindale v. Booth, 3 B. & Ad. 498, 505) downwards, supports that, and there was no occasion otherwise for the statute of King James (21 Jac. 1 C. 19, §§ 10, 11, which originated the law with respect to property remaining in the reputed ownership or order and disposition of a bankrupt). There is no sufficient authority for saying that the want of delivery of possession makes void a bill of sale of goods and chattels; it is *prima facie* evidence of a fraudulent intention, and if it be a badge of fraud only, in order to ascertain whether a deed be fraudulent or not, all the circumstances must be taken into consideration. (Per Patteson, J., in Martindale v. Booth, 3 B. & Ad. 498, 587)."

[2] Possession as Evidence of Fraud, 11 Cent. L. J. 21.

clared this to be a loose method of referring to the matter, and has ventured to assert that "a careful examination of this branch of the law will show that neither of the views so expressed is correct." The argument advanced by the writer is that bald possession is not conclusive evidence of fraud; it is only a circumstance admissible in evidence with other circumstances as bearing upon the question of the actual existence of fraud. The conclusion drawn in the article mentioned is that "possession is a link in a chain of circumstances, pertinent in proving fraud, having greater or less weight according to the circumstances of each case," and "is not necessarily either conclusive or *prima facie* evidence of fraud." Some accompanying circumstances attending the possession or, so to speak, coloring it must be shown to establish fraud.

The statutory policy introduced in several of the States, under which a failure to effect a change of possession is made either presumptively or conclusively fraudulent, has robbed the question of much of its importance. We cannot but regard the theory advanced by this writer as sound, but we fail to discover that the cases fully support it.

§ 248. **Transfers presumptively or prima facie fraudulent.**— The question of how far retention of possession of the property by the vendor is to be considered as evidence of fraud in its sale has been a subject of much consideration by the courts and in legislative bodies in the United States.[1] In some States the matter is regulated by statute, but the statutes and the rules for their interpretation vary in the different States. In other States the question is left to be disposed of by the rules and principles which obtain at common law. The general subject is capable of extended discussion both because of its importance and for

[1] It must be remembered that "the statute with its presumptions founded upon non-delivery and absence of changed possession draws no distinction between modes of transfer." Stimson v. Wrigley, 86 N. Y. 337.

the reason that the authorities relating to it are full of subtle distinctions. We can only consider its general outlines and notice the leading cases and the important exceptions to the general rule in the principal States. The struggle is between two policies and rules of evidence or proof, viz.: whether the neglect to change possession of the property shall be considered presumptively or conclusively fraudulent as to creditors. The prevalent policy is to consider the absence of a change of possession as *prima facie* or presumptive evidence of fraud.[1]

§ 249. **The New England cases.**—The cases supporting the former theory will be first noticed, giving brief quotations from leading authorities. In Massachusetts, "possession of the vendor is only evidence of fraud, which, with the manner of the occupation, the conduct of the parties, and all other evidence bearing upon the question of fraud, is for the consideration of the jury."[2] In New Hampshire

[1] See Crawford v. Kirksey, 55 Ala. 300; Mayer v. Clark, 40 Ala. 259; Vredenbergh v. White, 1 Johns. Cas. (N. Y.) 156; Beals v. Guernsey, 8 Johns. (N. Y.) 446; Barrow v. Paxton, 5 Johns. (N. Y.) 258. In Bissell v. Hopkins, 3 Cow. (N. Y.) 166, 188, Savage, Chief-Justice, said: "The possession by the vendor of personal chattels after the sale is not conclusive evidence of fraud. The vendee may, notwithstanding, upon proof that the sale was *bona fide* and for a valuable consideration, and that the possession of the vendor after such sale was in pursuance of some agreement not inconsistent with honesty in the transaction, hold under his purchase against creditors." See Davis v. Turner, 4 Gratt. (Va.) 422, where the doctrine of fraud *per se* is examined and repudiated. See Forkner v. Stuart, 6 Gratt. (Va.) 197; Howard v. Prince, 11 N. B. R. 322.

[2] Ingalls v. Herrick, 108 Mass. 354; Shurtleff v. Willard, 19 Pick. (Mass.) 202; Brooks v. Powers, 15 Mass. 244; Hardy v. Potter, 10 Gray (Mass.) 89. In Dempsey v. Gardner, 127 Mass. 381, Gray, C. J., said: "By the law as established in this commonwealth, it was necessary, as against subsequent purchasers or attaching creditors, that there should be a delivery of the property. No such delivery, actual or symbolical, was proved. The buyer did no act by way of taking possession or exercising ownership, and the seller did not agree to hold or keep the horse for him. . . . . There was no evidence of delivery for the consideration of the jury, except such as might be implied from the execution and delivery of the bill of sale. That was not enough. Carter v. Willard, 19 Pick. (Mass.) 1; Shumway v. Rutter, 7 Pick. (Mass.) 56, 58; S. C. 8 Pick. (Mass.) 443, 447; Packard v. Wood, 4 Gray (Mass.) 307; Rourke v. Bullens, 8 Gray (Mass.) 549; Veazie v. Somerby, 5 Allen (Mass.) 280, 289."

it is said that "in cases of absolute sales, possession and use by the vendor, after the sale, is always *prima facie*, and, if unexplained, conclusive evidence of a secret trust."[1] So in Maine failure to change possession is presumptive evidence of fraud, and the jury are to determine the good faith of the transaction.[2] In Rothchild v. Rowe[3] the Supreme Court of Vermont said: "The law is well settled in this State that there must be a substantial and visible change of possession to protect property from attachment by the creditors of the vendor. . . . . The vendee must acquire the open, notorious, and exclusive possession of the property, and this implies that the vendor is divested of the use, possession, or employment of the property."[4] The rule that non-delivery of possession is *prima facie* evidence of fraud obtains in Rhode Island.[5]

§ 250. **Rule in New York and various other States.**—After much fluctuation and discussion, the general rule is now established by statute in New York, that the retention of possession by the vendor is presumptively fraudulent. This presumption may be overcome by proof satisfactory to a jury that the retention of possession was in good faith, for an honest purpose, and with no design to defraud creditors.[6] If good faith is established it is not essential in that State to show "a good reason for the want of change of posses-

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[1] Coburn v. Pickering, 3 N. H. 428. See Lang v. Stockwell, 55 N. H. 561; Cutting v. Jackson, 56 N. H. 253; Sumner v. Dalton, 58 N. H. 295; Stowe v. Taft, 58 N. H. 445; Shaw v. Thompson, 43 N. H. 130.

[2] Shaw v. Wilshire, 65 Me. 485; Bartlett v. Blake, 37 Me. 124; Fairfield Bridge Co. v. Nye, 60 Me. 372; Googins v. Gilmore, 47 Me. 9.

[3] 44 Vt. 389, 393.

[4] Compare Kendall v. Samson, 12 Vt. 515; Ridout v. Burton, 27 Vt. 383; Jewett v. Guyer, 38 Vt. 209; Fish v. Clifford, 54 Vt. 344; Weeks v. Prescott, 53 Vt. 57.

[5] Sarle v. Arnold, 7 R. I. 582; Mead v. Gardiner, 13 R. I. 257. See Beckwith v. Burrough, 13 R. I. 294; Goodell v. Fairbrother, 12 R. I. 233. As to the rule in Connecticut, see § 251.

[6] Ball v. Loomis, 29 N. Y. 412; Miller v. Lockwood, 32 N. Y. 293; Ford v. Williams, 24 N. Y. 359; Hollacher v. O'Brien, 5 Hun (N. Y.) 277; Burnham v. Brennan, 74 N. Y. 597; Thompson v. Blanchard, 4 N. Y. 303. See Mumper v. Rushmore, 79 N. Y. 19.

sion,"[1] which is certainly crowding the rule to an extreme limit hostile to the creditor interests. The principle that the possession may be explained is extensively recognized. In addition to the States already named it obtains in New Jersey,[2] Virginia,[3] Alabama,[4] Louisiana,[5] Ohio,[6] Indiana,[7] Michigan,[8] Minnesota,[9] Wisconsin,[10] Nebraska,[11] Nevada,[12] Arkansas,[13] Kansas,[14] and in the Federal tribunals.[15]

§ 251. **Fraudulent per se or conclusive.**—The cases just considered give what may be termed the equitable and charitable view of the question. But the policy embodied in many of these cases, and in the statutes upon which they are in certain instances founded, is not considered in some of the States rigid or severe enough to suppress the evils engendered by this class of transactions. Thus in Connecticut, Loomis, J., in delivering the opinion of the court in the case of Capron v. Porter,[16] observed: "That the retention of the possession of personal property by the vendor

[1] Mitchell v. West, 55 N. Y. 107; Hanford v. Artcher, 4 Hill (N. Y.) 271.

[2] Miller *ads.* Pancoast, 29 N. J. Law 253; Sherron v. Humphreys, 14 N. J. Law 220. "The possession by the vendor of personal chattels after the sale is not conclusive evidence of fraud. The vendee may notwithstanding, upon proof that the sale was *bona fide* and for a valuable consideration, and that the possession of the vendor after sale was in pursuance of some agreement not inconsistent with honesty in the transaction, hold under his purchase against creditors." Miller *ads.* Pancoast, 29 N. J. Law 253.

[3] Howard v. Prince, 11 N. B. R. 322; Davis v. Turner, 4 Gratt. (Va.) 423, a leading case of international repute.

[4] Mayer v. Clark, 40 Ala. 259; Crawford v. Kirksey, 55 Ala. 282; Moog v. Benedicks, 49 Ala. 512.

[5] Keller v. Blanchard, 19 La. Ann. 53; Guice v. Sanders, 21 La. Ann. 463.

[6] Collins v. Myers, 16 Ohio 547; Thorne v. Bank, 37 Ohio St. 254.

[7] Kane v. Drake, 27 Ind. 29; Rose v. Colter, 76 Ind. 590; New Albany Ins. Co. v. Wilcoxson, 21 Ind. 355.

[8] Molitor v. Robinson, 40 Mich. 200, per Cooley, J.

[9] Blackman v. Wheaton, 13 Minn. 326; Benton v. Snyder, 22 Minn. 247; Camp v. Thompson, 25 Minn. 175.

[10] Wheeler v. Konst, 46 Wis. 398; Blakeslee v. Rossman, 43 Wis. 116; Osen v. Sherman, 27 Wis. 505.

[11] Uhl v. Robison, 8 Neb. 272; Densmore v. Tomer, 14 Neb. 392.

[12] Conway v. Edwards, 6 Nev. 190. Compare Doak v. Brubaker, 1 Nev. 218.

[13] George v. Norris, 23 Ark. 128.

[14] Phillips v. Reitz, 16 Kans. 396.

[15] Warner v. Norton, 20 How. 448. But see Hamilton v. Russel, 1 Cranch 310.

[16] 43 Conn. 383.

after a sale raises a presumption of fraud which cannot be repelled by any evidence that the transaction was *bona fide* and for valuable consideration, is still adhered to and enforced by the courts in this State with undiminished rigor, as a most important rule of public policy. The reason of the rule is that as against a person who was once the owner of the property, and all who claim by purchase from him, the continued possession is to be regarded as a sure *indicium* of continued ownership, and that the possessor would obtain by such continued possession a false credit to the injury of third persons, if there was no such rule to protect them."[1] Clow v. Woods[2] is the leading case in Pennsylvania. Gibson, J., said: "Where possession has been retained without any stipulation in the conveyance, the cases have uniformly declared that to be, not only evidence of fraud, but fraud *per se*. Such a case is not inconsistent with the most perfect honesty; yet a court will not stop to inquire whether there be actual fraud or not; the law will impute it, at all events, because it would be dangerous to the public to countenance such a transaction under any circumstances. The parties will not be suffered to unravel it, and show, that what seemed fraudulent was not in fact so."[3] In Born v. Shaw[4] the court observed: "When possession is retained by the vendor, it is not only

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[1] Compare Osborne v. Tuller, 14 Conn. 529; Norton v. Doolittle, 32 Conn. 405; Elmer v. Welch, 47 Conn. 56; Hull v. Sigsworth, 48 Conn. 258; Hatstat v. Blakeslee, 41 Conn. 301; Seymour v. O'Keefe, 44 Conn. 128; Meade v. Smith, 16 Conn. 346. See especially Hamilton v. Russel, 1 Cranch 310; and compare Warner v. Norton, 20 How. 448; Gibson v. Love, 4 Fla. 217; Monroe v. Hussey, 1 Oregon 188.

[2] 5 S. & R. (Pa.) 280.

[3] See Thompson v. Paret, 94 Pa. St. 275; Pearson v. Carter, 94 Pa. St. 156; McKibbin v. Martin, 64 Pa. St. 352; Garman v. Cooper, 72 Pa. St. 37; Worman v. Kramer, 73 Pa. St. 378; Dawes v. Cope, 4 Binn. (Pa.) 258; Davis v. Bigler, 62 Pa. St. 242; Shaw v. Levy, 17 S. & R. (Pa.) 99; Born v. Shaw, 29 Pa. St. 288; Young v. McClure, 2 W. & S. (Pa.) 151. "Clow v. Woods, 5 S. & R. (Pa.) 275, decided by this court in 1819, is the *magna charta* of our law upon this subject," per Sharswood, J., in McKibbin v. Martin, 64 Pa. St. 356.

[4] 29 Pa. St. 292.

evidence of fraud, but fraud *per se*." In Maryland[1] a bill of sale may be recorded, and the title of the grantee is then as effectually protected as if the sale had been accompanied by delivery.[2] It is a well-settled doctrine in Kentucky that where there is an absolute sale of movable property, the possession must accompany the title, or the sale will be void in law as to creditors or subsequent purchasers, even though the contract contain a stipulation that the vendor is to retain the possession till a future day.[3] After much conflict,[4] the rule seems to be established in Missouri that a sale without delivery of possession is conclusively presumed to be fraudulent.[5] In Illinois it is fraud *per se* to leave the vendor in possession.[6] Much the same policy is pursued in Iowa[7] and California.[8]

§ 252. **Practical results of the conflicting policies.**—Brushing aside for the present the objections already outlined to the prominence accorded the question of change of possession in controversies of the class under consideration, it becomes important to consider which of the two rules just instanced is the more salutary in practice. Possibly the creditor class would oftener effect a recovery when the presumption of fraud from failure to change possession is absolute. It does not follow, however, that the latter rule is

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[1] Kreuzer v. Cooney, 45 Md. 582.

[2] Clary v. Frayer, 8 G. & J. (Md.) 416. See Price v. Pitzer, 44 Md. 527.

[3] Robbins v. Oldham, 1 Duv. (Ky.) 28; Brummel v. Stockton, 3 Dana (Ky.) 135; Bradley v. Buford, Sneed (Ky.) 12; Morton v. Ragan, 5 Bush (Ky.) 334. See Cummins v. Griggs, 2 Duvall (Ky.) 87.

[4] See Claflin v. Rosenberg, 42 Mo. 448; Rocheblave v. Potter, 1 Mo. 561; Foster v. Wallace, 2 Mo. 231; Sibly v. Hood, 3 Mo. 290; King v. Bailey, 6 Mo. 575; Shepherd v. Trigg, 7 Mo. 151.

[5] Claflin v. Rosenberg, 42 Mo. 448; Bishop v. O'Connell, 56 Mo. 158; Burgert v. Borchert, 59 Mo. 80; Wright v. McCormick, 67 Mo. 426.

[6] Thompson v. Yeck, 21 Ill. 73; Ticknor v. McClelland, 84 Ill. 471; Rozier v. Williams, 92 Ill. 187; Johnson v. Holloway, 82 Ill. 334; Richardson v. Rardin, 88 Ill. 124; Greenebaum v. Wheeler, 90 Ill. 296; Hart v. Wing, 44 Ill. 141.

[7] Prather v. Parker, 24 Iowa 26; Boothby v. Brown, 40 Iowa 104; Hesser v. Wilson, 36 Iowa 152; Sutton v. Ballou, 46 Iowa 517.

[8] See Lay v. Neville, 25 Cal. 552; Hesthal v. Myles, 53 Cal. 623; Woods v. Bugbey, 29 Cal. 466.

a wise one, or the recovery in such cases always just. "In seeking to catch rogues" it is not the proper function of the courts to "ensnare honest men. We may become so zealous against fraud as to restrain the free action of honesty, a result that would be most disastrous. Better is it that many frauds should go undetected than that the means of detection or prevention should treat honest men as guilty, or teach men to be always suspicious of their neighbors, and watchful that honest acts be precisely measured according to the standard of legal morality."[1] Parties designing to make covinous alienations will so frame their actions as to endeavor to leave no *indicia*, or to create no presumptions of fraud. Honest people, on the other hand, conscious of no design to wrong others, and giving little thought to the appearance or form of the transaction, are often the victims of unfortunate circumstances, and suddenly discover that the law imputes to their innocent acts or omissions wicked designs, than which nothing was further from their minds. Hence Cabell, J., in commenting upon the mischievous operation of the absolute rule, said: "I have found myself compelled as judge to pronounce transactions to be fraudulent and void as to creditors which were known to be perfectly fair and *bona fide*, and were not intended or calculated to delay, hinder, or defraud creditors."[2] The rule creating a fraudulent presumption in these cases seems to be sufficiently severe in its operation. A policy which blindly ignores the real intent of the parties, practically excludes all evidence concerning the transaction or its underlying motives, and conclusively brands it as fraudulent by closing the mouths of the witnesses, should be adopted with great reluctance. In such cases "the question is not whether the transaction was honest or otherwise, but whether there is not that evidence

[1] Hugus v. Robinson, 24 Pa. St. 11.

[2] Davis v. Turner, 4 Gratt. (Va.) 422, 471.

of fraudulent intent which precludes inquiry into its integrity as a question of morals." It is a rule of policy as well as of evidence.[1] It seems clear that: "The statute of frauds ought not to be construed to make innocent parties sufferers."[2] That such is often the result cannot be questioned. It was found in Virginia that the cases of honest transfers in which the vendor retained possession were too numerous and too frequent to allow of a further adherence to the old arbitrary rule of fraud *per se*. It resulted in the decision of Davis v. Turner,[3] repudiating the rule as to absolute presumptions. The court said: "It seems to be carrying a distrust of juries too far to suppose them incapable, with the aid of a wholesome *prima facie* presumption, to administer justice on this subject, in the true spirit of the statute, and it is better to confine the interposition of the court to guiding, instead of driving them by instructions, and to the power of granting new trials in cases of plain deviation." In the same case the court observe that the conclusive presumption as a test of a fraudulent purpose has no claim to certainty; on the contrary it concedes its own fallibility, by crushing mercilessly the most convincing evidence of fairness and good faith.[4]

[1] Kirtland v. Snow, 20 Conn. 28.

[2] Sydnor v. Gee, 4 Leigh (Va.) 545; Cadogan v. Kennett, 2 Cowp. 432, per Lord Mansfield.

[3] 4 Gratt. (Va.) 423, 444.

[4] *Cole* v. *White*. — "But when we look at the daily business of life, out of court, another aspect of this question presents itself. Mortgages of personal property, as ships, lake vessels, canal boats, and river craft; the stock and implements of the mechanic or small manufacturer; the furniture of the innkeeper; assignments for the benefit of creditors, leaving the goods and debts assigned publicly to be managed and disposed of by the original owner as an agent, best acquainted with the business, and acting for the benefit of creditors who have full confidence in his integrity; all these have grown out of the usages of modern society; the necessities of commerce; the conveniences of daily life; the wants and usages of trade and industry. They have followed in the train of commerce, credit, and enterprise. Like them, they have been largely productive of benefits to society; yet those benefits, like the results of all other human action, are not unmixed with evil. By such means the adventure, capacity, acquirements, and industry of the young or needy have been aided and stimulated; large concerns of honorable but unfortunate merchants have been set-

§ 253. Actual change of possession required.—The words "actual and continued change of possession" in the statute in New York, are construed to mean "an open public change of possession, which is to continue and be manifested continually by outward and visible signs, such as render it evident that the possession of the judgment-debtor has ceased."[1] In Crandall v. Brown[2] the court observed that "possession cannot be taken by words and inspection." In Otis v. Sill,[3] Paige, J., said: "It has been repeatedly decided that if an assignee or mortgagee leaves goods assigned or mortgaged in the possession of the assignor or mortgagor as his agent, this is not an actual change of possession within the meaning of the fifth section of the statute of frauds."[4] In Billingsley v. White,[5] Williams, J., in delivering the opinion of the Pennsylvania Supreme Court, said: "The delivery must be actual, and such as the nature of the property or thing sold, and the circumstances of the sale will reasonably admit, and such as the vendor is capable of making. A mere symbolical or constructive delivery, where an actual or real one is reasonably practicable, is of no avail. There must be an actual separation of the property from the possession of the vendor at the time of the sale, or within a reasonable time afterward, according to the nature of the property."[6] It is suf-

tled to the greatest advantage of the creditors and the least possible loss of the insolvent; and the kindness of parents or the generosity of friends has been enabled to preserve the comforts of a home to the wife and children of a bankrupt, without the slightest injury or fraud (save in legal fiction) to prior creditors or subsequent purchasers. Society reaps nothing but unquestioned benefit from nine-tenths of such assignments or securities occurring in actual life." Cole v. White, 26 Wend. (N. Y.) 523.

[1] Topping v. Lynch, 2 Rob. (N. Y.) 488; approved in Steele v. Benham, 84 N. Y. 638. Compare Hale v. Sweet, 40 N. Y. 97; Cutter v. Copeland, 18 Me. 127; Osen v. Sherman, 27 Wis. 501; Lesem v. Herriford, 44 Mo. 323.

[2] 18 Hun (N. Y.) 461, 463.

[3] 8 Barb. (N. Y.) 102, 122.

[4] See Hanford v. Artcher, 4 Hill (N. Y.) 271.

[5] 59 Pa. St. 466.

[6] Where the goods are locked up and the keys are delivered to the vendee, and the vendor removes from the house,

ficient if the possession taken of the goods is such as the nature of the case would permit.[1] It may be observed that the fact that a party testified in a general way that he took possession, or was in possession, will have no weight when the evidence shows precisely what was done.[2]

It is obvious from a casual consideration of these cases that a change of possession which will protect the title of the purchaser, as against creditors, must consist of a complete surrender and discontinuance of the exercise of acts of ownership by the vendor and the assumption of such acts on the part of the vendee.

§ 254. **Question for the jury.**—The doctrine of Massachusetts,[3] followed by many of the States, makes continued possession, as evidence of fraud, a question for the jury.[4] It is a question of intent to be settled by them as a question of fact,[5] even though the evidence of good faith and absence of intent to defraud is uncontradicted.[6] If the jury err, justice may be obtained by setting the verdict aside,[7] but otherwise the court is not entitled to interfere with the prerogative of the jury.

§ 255. **Overcoming the presumption.**—The presumption of fraud, which the statute raises from the fact that there was no actual change of possession of the chattels sold, practically becomes conclusive if not rebutted or overcome by

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this is as effectual as though the vendee had actually removed the property. Barr v. Reitz, 53 Pa. St. 256. See Benford v. Schell, 55 Pa. St. 393.

[1] Manton v. Moore, 7 T. R. 71.

[2] Steele v. Benham, 84 N. Y. 640; Miller v. Long Island R.R. Co., 71 N. Y. 380.

[3] Ingalls v. Herrick, 108 Mass. 351.

[4] See Mead v. Noyes, 44 Conn. 487; Thompson v. Blanchard, 4 N. Y. 303; Griswold v. Sheldon, 4 N. Y. 581; Davis v. Turner, 4 Gratt. (Va.) 422; Cutter v. Copeland, 18 Me. 127; Tilson v. Terwilliger, 56 N. Y. 273; Smith v. Welch, 10 Wis. 91; Allen v. Cowan, 23 N. Y. 507; Hollacher v. O'Brien, 5 Hun (N. Y.) 277; Warner v. Norton, 20 How. 460; Scott v. Winship, 20 Ga. 430; Chamberlain v. Stern, 11 Nev. 268.

[5] Miller *ads.* Pancoast, 29 N. J. Law 254.

[6] Blaut v. Gabler, 77 N. Y. 461.

[7] Hollacher v. O'Brien, 5 Hun (N. Y.) 277; Potter v. Payne, 21 Conn. 363.

competent proof in explanation.[1] There is nothing left for the jury to pass upon or to consider.

It was observed in the Supreme Court of Kansas,[2] that the law did not imply that one purchasing property without taking actual possession, if there were creditors of the vendor, was presumptively engaged in a fraudulent transaction, and that his conduct was to be scrutinized accordingly, but simply that one claiming under such a purchase takes nothing until he shows good faith and consideration.

§ 256. **Possession within a reasonable time.**—It is frequently said that the vendee must acquire possession of the subject-matter of the sale within a reasonable time. According to some of the cases a "reasonable time" must be construed not with reference to the mere convenience of the party, but only with reference to the time fairly required to perform the act of taking possession, or doing what is its equivalent.[3] The cases where it is held that immediate delivery is not practicable are usually illustrated in the books by the case of a sale of a ship at sea where immediate delivery is a physical impossibility; and the same principle has been applied to a case where the situation of the parties at the time of the sale was so remote from the place where the property was situated, that immediate manual delivery was impossible. What is a reasonable time must be determined by the circumstances of each case;[4] no definite rule can be laid down.[5]

§ 257. **Change of possession must be continuous.**—In a controversy which arose in New York, it appeared that the sale was accompanied by an immediate delivery of the property to the vendee, and an actual change of possession, and

[1] Mayer v. Webster, 18 Wis. 396; Cheatham v. Hawkins, 76 N. C. 338, and cases cited; State v. Rosenfeld, 35 Mo. 472.

[2] Kansas Pacific Ry. Co. v. Cousé, 17 Kans. 571–575.

[3] See Seymour v. O'Keefe, 44 Conn. 132; Meade v. Smith, 16 Conn. 346.

[4] State v. King, 44 Mo. 238.

[5] Bishop v. O'Connell, 56 Mo. 158.

that, after considerable time had passed, the property came again into the possession of the vendor. It was decided that the law would not measure the lapse of time from the sale and delivery to the renewed possession by the vendor directly from his vendee, and say that a change of possession continued for a longer period would satisfy the statute, but for a shorter period would not have that effect. The statute was said to be imperative that the sale must be followed by a continued change of possession or the fraudulent presumption would obtain.[1]

§ 258. **Temporary resumption of possession.**—Where it appears that the property passed into the hands of the vendor for a mere temporary purpose, and under circumstances which showed that the return of the property was not effected with a view of enabling the vendor to use it as his own while the legal title was in another, the creditors of the vendor will not be authorized to attack the sale as fraudulent and void. This was held where the subject-matter of the sale was a cutter which the vendee occasionally allowed the vendor to use.[2] Questions of this class often depend for their solution upon the *locus* of the action; whether it be in a State where the presumption can be rebutted or one where it is conclusive. By way of contrast with Knight v. Forward, is Webster v. Peck,[3] where it appeared that a vendor, who had sold a horse, within a week after the sale hired him of the vendee, and was using him to all appearances as his own, in the same manner as before the sale. This was considered to be a restoration of the possession,[4] and the vendee lost his horse to an attaching creditor of the vendor.[5]

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[1] See Tilson v. Terwilliger, 56 N. Y. 273; Garman v. Cooper, 72 Pa. St. 37; Young v. McClure, 2 W. & S. (Pa.) 147; Bacon v. Scannell, 9 Cal. 271; Miller v. Garman, 69 Pa. St. 134; Norton v. Doolittle, 32 Conn. 405.

[2] Knight v. Forward, 63 Barb. (N. Y.) 311.

[3] 31 Conn. 495.

[4] See Davis v. Bigler, 62 Pa. St. 248; Barr v. Reitz, 53 Pa. St. 256.

[5] Compare Boud v. Bronson, 80 Pa. St. 360; Johnson v. Willey, 46 N. H. 75; Lewis v. Wilcox, 6 Nev. 215.

§ 259. **Concurrent possession insufficient.**—The authorities seem to be almost unanimous in holding that concurrent possession by the vendor and vendee will not satisfy the rule or the statute requiring a change of possession.[1] "There cannot, in such case," said Duncan, J., "be a concurrent possession; it must be exclusive, or it would, by the policy of the law, be deemed colorable."[2] Again, it is said to be "mere mockery to put in another person to keep possession jointly with the former owner."[3] In Wordall v. Smith[4] Lord Ellenborough observed: "To defeat the execution by a bill of sale, there must appear to have been a *bona fide*, substantial change of possession. . . . . A concurrent possession with the assignor is colorable. There must be an exclusive possession under the assignment, or it is fraudulent and void as against creditors."[5] So it is no change of possession to leave the property in charge of the vendor's agent.[6]

§ 260. **Possession of bailee.**—The sale of personal property in the hands of a bailee is good against an execution creditor, though there be no actual delivery, provided the vendor do not retake the possession.[7] In Dempsey v. Gardner[8] Chief-Justice Gray said: "Where property sold is at the time in the custody of a third person, notice to him of the sale is sufficient to constitute a delivery as against subsequent attaching creditors."[9] The reason of

[1] Sumner v. Dalton, 58 N. H. 296; Lang v. Stockwell, 55 N. H. 561; Steelwagon v. Jeffries, 44 Pa. St. 407. Compare Townsend v. Little, 109 U. S. 504.

[2] Clow v. Woods, 5 S. & R. (Pa.) 287. See McKibbin v. Martin, 64 Pa. St. 359, per Sharswood, J.; Regli v. McClure, 47 Cal. 612; Brawn v. Keller, 43 Pa. St. 106.

[3] Babb v. Clemson, 10 S. & R. (Pa.) 428. See Worman v. Kramer, 73 Pa. St. 378.

[4] 1 Campb. 332.

[5] See Trask v. Bowers, 4 N. H. 314.

[6] Brunswick v. McClay, 7 Neb. 137. But compare Allen v. Cowan, 23 N. Y. 502.

[7] Linton v. Butz, 7 Pa. St. 89; Worman v. Kramer, 73 Pa. St. 385; Goodwin v. Kelly, 42 Barb. (N. Y.) 194.

[8] 127 Mass. 381, 383.

[9] Citing Tuxworth v. Moore, 9 Pick. (Mass.) 347; Carter v. Willard, 19 Pick. (Mass.) 1; Russell v. O'Brien, 127 Mass. 349. See Hildreth v. Fitts,

the rule calling for change of possession is entirely satisfied in such cases.[1]

§ 261. **No delivery where purchaser has possession.**— Where at the time of the sale the property is in the possession and subject to the control of the vendee the law does not require an act of delivery. The sale is complete without it.[2] In Warden v. Marshall,[3] Hoar, J., said: "The oil being already in the plaintiff's possession in the bonded warehouse, no other delivery was necessary to complete the sale." In Lake v. Morris,[4] Hinman, C. J., observed: "At the time of the purchase the plaintiff was keeping the horses for his nephew, and the defendant claims that, because there was no formal delivery of the possession of them by the vendor to the purchaser, the sale was in point of law fraudulent and void against creditors. Of course no such delivery could have taken place without first taking the horses from the plaintiff's possession for the mere purpose of redelivering them to him again. But a merely formal act like this we presume would never occur between parties whose only object was to place the purchased property in the hands of the purchaser for his use."

§ 262. **When technical delivery is not essential.**—In some instances the necessities of the case render a technical delivery of the property impossible; in such cases the usual penalties will not be visited upon the purchaser. Thus a sale of cattle roaming over uninclosed plains with those of other owners, if *bona fide*, will not be invalid as against creditors of the vendor, merely for want of delivery, until

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53 Vt. 684; Doak v. Brubaker, 1 Nev. 218; How v. Taylor, 52 Mo. 592; Kendall v. Fitts, 22 N. H. 1.

[1] The rule is otherwise as to a mere servant; the possession of a servant is the possession of his employer. Hurlburd v. Bogardus, 10 Cal. 519; Doak v. Brubaker, 1 Nev. 218; Flanagan v. Wood, 33 Vt. 338. See Chester v. Bower, 55 Cal. 46.

[2] Martin v. Adams, 104 Mass. 262; Warden v. Marshall, 99 Mass. 305; Nichols v. Patton, 18 Me. 231; Lake v. Morris, 30 Conn. 204.

[3] 99 Mass. 306.

[4] 30 Conn. 204.

the purchaser has had a reasonable time to separate and brand the cattle; and the branding of the cattle by the purchaser will constitute a good delivery, although the cattle are afterward allowed to remain in the same uninclosed range of pasture.[1] It is not essential that a transfer of stock should be made on the books of a corporation, to be valid against attaching creditors, when not called for by some positive provision of the charter.[2]

A symbolical delivery of a large quantity of logs, landed upon a stream preparatory to driving, has been considered sufficient.[3] The law accommodates itself to the necessities of the business and the nature of the property, making a symbolical delivery sufficient where nothing but a constructive possession can ordinarily be had.[4] "It often happens," says Sharswood, J., "that the subject of the sale is not reasonably capable of an actual delivery, and then a constructive delivery will be sufficient. As in the case of a vessel at sea, of goods in a warehouse, of a kiln of bricks, of a pile of squared timbers in the woods, of goods in the possession of a factor or bailee, of a raft of lumber, of articles in the process of manufacture, where it would be not indeed impossible, but injurious and unusual to remove the property from where it happens to be at the time of the transfer."[5]

§ 263. Excusing want of change of possession.—The con-

[1] Walden v. Murdock, 23 Cal. 540. *Contra*, Sutton v. Ballou, 46 Iowa 517.

[2] Boston Music Hall Assoc. v. Cory, 129 Mass. 435. See Beckwith v. Burrough, 13 R. I. 294, and cases.

[3] Bethel Steam Mill Co. v. Brown, 57 Me. 9.

[4] Compare Terry v. Wheeler, 25 N. Y. 520; Boynton v. Veazie, 24 Me. 286; Doak v. Brubaker, 1 Nev. 218; Long v. Knapp, 54 Pa. St. 514; Allen v. Smith, 10 Mass 308; Tognini v. Kyle, 17 Nev. 215. But compare Wilson v. Hill, 17 Nev. 401.

[5] McKibbin v. Martin, 64 Pa. St. 357. Citing Clow v. Woods, 5 S. & R. (Pa.) 275; Cadbury v. Nolen, 5 Pa. St. 320; Linton v. Butz, 7 Pa. St. 89; Haynes v. Hunsicker, 26 Pa. St. 58; Chase v. Ralston, 30 Pa. St. 539; Barr v. Reitz, 53 Pa. St. 256; Benford v. Schell, 55 Pa. St. 393. See also Fitch v. Burk, 38 Vt. 683; Hutchins v. Gilchrist, 23 Vt. 82; Allen v. Smith, 10 Mass. 308; Conway v. Edwards, 6 Nev. 190; Walden v. Murdock, 23 Cal. 540; Cartwright v. Phœnix, 7 Cal. 281; Woods v. Bugbey, 29 Cal. 472.

tention was urged by counsel, in Mitchell v. West,[1] that in addition to proof that the sale of the chattels was *bona fide*, and that there was no intent to defraud the creditors of the vendor, it was necessary to show some valid excuse or reason for leaving the property in the possession of the vendor, or stated in another form, that the absence of intent to defraud creditors could not be established without showing a good reason for the want of change of possession. The court upon the authority of Hanford v. Artcher,[2] held that this was not the case. The very purpose of the law in presuming fraud from a failure to deliver possession was to suppress sales made in bad faith and without consideration. Manifestly this presumption ought to disappear where both good faith and consideration are proved to exist. Clute v. Fitch[3] is an illustration of a sufficient excuse for failing to change possession. A sleigh was sold in July, and owing to the difficulty of removing it at that season of the year was stored, by agreement, in the vendor's barn until the ensuing winter. This was considered a satisfactory explanation of the failure to change possession. It may be here noted that a vendee may continue at the old stand the business which he has purchased of the vendor.[4]

§ 264. **Change of possession of realty.**—There seems to be a distinction recognized in the law as to the effect of a failure to change possession of realty as distinguished from the rule applicable to personalty. In Phettiplace v. Sayles,[5] a leading and highly important case, Story, J., said: "Another circumstance, relied on to invalidate the good faith of this conveyance, is, that no change of possession took place, but the grantor continued in possession notwithstanding the sale, and occupied the farm as he had

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[1] 55 N. Y. 107.
[2] 4 Hill (N. Y.) 271.
[3] 25 Barb. (N. Y.) 428.
[4] Ford v. Chambers, 28 Cal. 13.
[5] 4 Mason, 321.

been accustomed to do. This circumstance is not without weight, and, in a doubtful case, would incline the court not to yield any just suspicions arising from other causes. But possession, after a sale of real estate, does not *per se* raise a presumption of fraud, as it does in the case of personal estate. In the latter case, possession is *prima facie* evidence of ownership, and where a party, who is owner, sells personal property absolutely, and yet continues to retain the visible and exclusive possession, the law deems such conduct a constructive fraud upon the public, and the sale as to creditors, wholly inoperative, whether it be for a valuable consideration or not. This doctrine has its foundation in a great public policy, to protect creditors against secret, collusive transfers. The same rule does not apply to real estates. Possession is not here deemed evidence of ownership. . . . . The public look not so much to possession as to the public records as proofs of the title to such property. The possession, therefore, must be inconsistent with the sale, and repugnant to it in terms or operation, before it raises a just presumption of fraud."[1] The rule seems to be established in New York to the effect that the continuance in possession of the grantor is merely a circumstance proper to be considered in connection with other evidence tending to establish a design to defraud creditors, but it did not of itself warrant a finding as a legal conclusion that the deed was fraudulent.[2]

[1] See Every v. Edgerton, 7 Wend. (N. Y.) 260; Bank of the U. S. v. Housman, 6 Paige (N. Y.) 526; Fuller v. Brewster, 53 Md. 363; Clark v. Krause, 2 Mackey (D. C.) 567.

[2] Clute v. Newkirk, 46 N. Y. 684. Compare Steward v. Thomas, 35 Mo. 202; Apperson v. Burgett, 33 Ark. 328; Tompkins v. Nichols, 53 Ala. 197; Collins v. Taggart, 57 Ga. 355. In Avery v. Street, 6 Watts (Pa.) 249, Chief-Justice Gibson said: "It is well established that where land is conveyed want of correspondent possession is less evincive of fraud than where a chattel is sold, because the title to the former is evidenced by possession, not of the thing, but of the title deeds, which, like manual occupation in the case of a chattel, is the criterion." See Tibbals v. Jacobs, 31 Conn. 431; Merrill v. Locke, 41 N. H. 489; Ludwig v. Highley, 5 Pa. St. 132; Allentown Bank v. Beck, 49 Pa. St. 394; Paulling v. Sturgus, 3 Stew. (Ala.) 95; Suiter v. Turner, 10 Iowa 517.

The reader must not be misled by the observation of Judge Story, that "possession is not here deemed evidence of ownership." The word "here" is significant in this connection. The rule enunciated by the learned court is partially founded on the disinclination of the law to presume fraud, and is limited in its application. Possession, on the other hand, ordinarily raises a presumption of ownership by the occupant of real property. True, it is the lowest degree of title, but nevertheless it is evidence of ownership;[1] descends to heirs;[2] is subject to taxation;[3] may be sold at sheriff's sale;[4] and is sufficient proof of title to support ejectment against trespassers.[5] In these cases the presumption of ownership arising from possession is indulged because it does not conflict with an honest and lawful intention, and does not lead to a conclusion bearing the stigma of fraud.

§ 265. **Change of possession on judicial sale.**—The rule is promulgated in Pennsylvania that a change of possession is not necessary to give validity to a judicial sale.[6] Chief-Justice Sharswood said, in Smith v. Crisman:[7] "Nothing is better settled in this State than that the purchaser of personal property at sheriff's or constable's sale, may leave it in the possession of the defendant, as whose property it was sold, under any lawful contract of bailment." The retention of possession in such a case is not a badge of fraud, because the sale is not the act of the party retaining the property, but is the act of the law, and being a judicial

[1] Rawley v. Brown, 71 N. Y. 85. See Ludlow v. McBride, 3 Ohio 241; Phelan v. Kelly, 25 Wend. (N. Y.) 389; Teabout v. Daniels, 38 Iowa 158; Gillett v. Gaffney, 3 Col. 351.

[2] Mooney v. Olsen, 21 Kans. 691–697.

[3] Blackwell on Tax Titles, pp. 5, 6.

[4] Yates v. Yates, 76 N. C. 142.

[5] Jones v. Easley, 53 Ga. 454; Bates v. Campbell, 25 Wis. 614; Doe v. West, 1 Blackf. (Ind.) 135; Christy v. Scott, 14 How. 282. See Burt v. Panjaud, 99 U. S. 180; Sedgwick & Wait on Trial of Title to Land, Chap. XXVII.

[6] Bisbing v. Third Nat. Bank, 93 Pa. St. 79; Maynes v. Atwater, 88 Pa. St. 496.

[7] 91 Pa. St. 430.

sale conducted by a sworn officer of the law, is deemed to be fair and honest until proved otherwise.[1]

The rule is quite universal in its application that where a stranger purchases and pays for property on execution sale, his failure to remove it from the possession of the defendant in execution does not render the sale fraudulent *per se* or presumptively fraudulent.[2] Under the statute in New York,[3] however, as interpreted by the courts,[4] the execution sale will be presumptively fraudulent unless accompanied by immediate delivery, and followed by an actual and continued change of possession, whether the plaintiff in execution or a third person be the purchaser. The reason of the rule and the evil at which it is aimed is said to justify these decisions. Finch, J., observed: "As an honest purchaser buys because he wants the property and its possession, and, therefore, naturally and usually takes it, the absence of this fact indicates some purpose different from that of an honest purchaser, and requires proof of good faith and honest intention. These considerations apply equally to cases where the transfer of title from the vendor is through the agency of a judgment and execution followed by a sheriff's sale."[5]

§ 266. **Delivery of growing crops.**—Where the property which is the subject-matter of sale is a growing crop, there is much dissension in the cases as to delivery of possession. It is said in Illinois that in the case of standing crops the possession is in the vendee until it is time to harvest them, and until then he is not required to take manual possession

[1] Craig's Appeal, 77 Pa. St. 456; Myers v. Harvey, 2 P. & W. (Pa.) 478.

[2] Abney v. Kingsland, 10 Ala. 355; Latimer v. Batson, 7 Dowl. & R. 106; Anderson v. Brooks, 11 Ala. 953; Walter v. Gernant, 13 Pa. St. 515; Dick v. Lindsay, 2 Grant (Pa.) 431; Poole v. Mitchell, 1 Hill's (S. C.) Law 404; Guignard v. Aldrich, 10 Rich. Eq. (S. C.) 253. See Hanford v. Obrecht, 49 Ill. 146. Compare O'Brien v. Chamberlain, 50 Cal. 285.

[3] 3 N. Y. R. S. 222, §§ 5, 6.

[4] Stimson v. Wrigley, 86 N. Y. 336; Fonda v. Gross, 15 Wend. (N. Y.) 628; Gardenier v. Tubbs, 21 Wend. (N. Y.) 169.

[5] Stimson v. Wrigley, 86 N. Y. 336.

of them.[1] Chief-Justice Cockburn, in speaking upon this subject, said: "It is impossible that there can be present delivery of growing crops. A growing crop is valueless, except so far as by its continuing growth it may hereafter benefit the purchaser, and it is only when it reaches maturity that it can be removed, nor is it intended that it shall be removed till it is ripe. . . . . In a popular and practical sense, growing crops are no more capable of removal than the land itself."[2] Kent said: "I do not know that corn, growing, is susceptible of delivery in any other way than by putting the donee into possession of the soil." Yet authority can be cited to the effect that the vendee does not acquire good title in such cases.[3]

§ 267. **Possession with power of sale.**—The effect of leaving a mortgagor in possession of the mortgaged goods, with power to sell the property and substitute by purchase other property in its stead, has created much dissension in the courts, and engendered a vast amount of litigation. The question came up before the United States Supreme Court in Robinson v. Elliott,[4] a case which we shall presently consider at length.[5] The mortgagors were authorized by the express terms of the mortgage to continue in possession of the mortgaged wares and merchandise, sell the same, supply their places with other goods by purchase, the lien of the mortgage to extend to the replenished stock. The mortgage was adjudged absolutely void. It was said that whatever might have been the motive which actuated the parties to the mortgage, it was manifest that the necessary result of what they did was to allow the mortgagors, under

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[1] Ticknor v. McClelland, 84 Ill. 471. See Bull v. Griswold, 19 Ill. 631; Thompson v. Wilhite, 81 Ill. 356; Bellows v. Wells, 36 Vt. 600. Compare Quiriaque v. Dennis, 24 Cal. 154.

[2] Branton v. Griffits, L. R. 2 C. P. D. 212.

[3] Smith v. Champney, 50 Iowa 174; Lamson v. Patch, 5 Allen (Mass.) 586; Stone v. Peacock, 35 Me. 385. See Raventas v. Green, 57 Cal. 255.

[4] 22 Wall. 513.

[5] See *infra*, Chap. XXII., on Fraudulent Chattel Mortgages.

cover of the mortgage, to sell the goods as their own, and appropriate the proceeds to their own purposes, and this, too, for an indefinite length of time. A mortgage which in its very terms contemplates such results, besides being no security to the mortgagees, operates in the most effectual manner to ward off other creditors; and where the instrument on its face shows that the legal effect of it is to delay creditors, the law imputes to it a fraudulent intent.[1]

[1] See Egdell v. Hart, 9 N. Y. 213.

CHAPTER XVIII.

EVIDENCE.

§ 268. Concerning evidence.
269. Competency of party as witness.
270. Proof and conclusiveness of judgments.
271. Burden of proof.
272. Secret trust.
273. Proof of insolvency of debtor.
274. Insolvency of vendee.
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279. Possession after conveyance.
280. Declarations of co-conspirators.
281. Proof of circumstances.
282. Other frauds.
283. Suspicions insufficient.
284. Proving value.
285. Testimony must conform to pleadings.

"Where fraud appears courts will drive through all matters of form."—*Buck* v. *Voreis*, 89 Ind. 117.

§ 268. **Concerning evidence.**—Manifestly general principles and rules of evidence cannot receive extended consideration in a special treatise relating to fraudulent alienations and creditors' bills. The sufficiency of the proofs requisite to uphold or defeat a creditor's proceeding to discover equitable assets or annul fraudulent transfers must, however, necessarily receive passing attention in its prominent and peculiar phases. The character of the evidence germane to the subjects of consideration,[1] notice,[2] intention,[3] badges of fraud,[4] creditors' liens,[5] and change of possession,[6] has been regarded as of sufficient importance to call for incidental treatment in separate chapters devoted to those topics, and will not be here discussed anew. Voluntary and fraudulent conveyances, as elsewhere shown,[7] are

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[1] See Chap. XV.
[2] See Chap. XXIV.
[3] See Chap. XIV.
[4] See Chap. XVI.
[5] See Chap. IV.
[6] See Chap. XVII.
[7] See Chap. XXVI.

regarded as valid and operative between the parties. Only a creditor or a purchaser from the donor or grantor can assail them, or inquire into the consideration, or the intent inspiring their execution. If the relationship of debtor and creditor is not admitted, the burden of proving it rests upon the creditor; the primary question in such cases is the existence of this relationship,[1] for if it is not established then the complainant stands in the attitude of an intermeddler raising a clamor which a court of equity would be illy employed in silencing.[2]

§ 269. **Competency of party as witness.**—Not only is it permissible for the defendant to testify as a witness in an equity cause,[3] but he may be compelled to give evidence upon the demand of the complainant.[4] The rule of the common law that no party to the record could be called as a witness for or against himself, or for or against any other party to the suit,[5] has been almost wholly abrogated.[6] Mr. Justice Swayne said in Texas v. Chiles:[7] "The innovation, it is believed, has been adopted in some form in most, if not in all the States and Territories of our Union.[8] It is eminently remedial, and the language in which it is couched should be construed accordingly."

§ 270. **Proof and conclusiveness of judgments.**—We have already discussed the principle underlying the rule which requires a judgment as the foundation of a creditor's proceeding to annul fraudulent alienations or discover equitable assets;[9] and the sufficiency or insufficiency of particular judgments to satisfy this exaction.[10] It follows from

[1] Cook v. Hopper, 23 Mich. 517, per Cooley, J. See Stanbro v. Hopkins, 28 Barb. (N. Y.) 271; Edmunds v. Mister, 58 Miss. 765; Donley v. McKiernan, 62 Ala. 34.

[2] Means v. Hicks, 65 Ala. 243.

[3] Clark v. Krause, 2 Mackey (D. C.) 571.

[4] Texas v. Chiles, 21 Wall. 488.

[5] 1 Greenleaf's Ev. §§ 329, 330.

[6] See Texas v. Chiles, 21 Wall. 488; Clark v. Krause, 2 Mackey (D. C.) 571.

[7] 21 Wall. 490.

[8] Citing 1 Greenleaf on Evidence, § 329.

[9] See Chap. IV., §§ 74–77.

[10] See §§ 76, 77.

what has been already said, and indeed has been expressly so decided, that a voluntary conveyance will be upheld as regards a judgment rendered against the debtor upon a fictitious debt.[1] It may be observed that where no evidence is offered to impeach the judgments, and it appears that they were regularly rendered by courts having jurisdiction, and were conclusive as between the parties, such judgments are competent evidence tending to prove the debt, even as to third parties, until something is shown to the contrary by way of impeachment.[2] A third party may, as a general rule, show that the judgment was collusive, and not founded upon an actual indebtedness or liability.[3] Were the rule otherwise the greatest injustice would result, since a stranger to the record cannot ordinarily move to vacate the judgment or prosecute a writ of error or an appeal.[4] Teed v. Valentine[5] is a peculiar case relating to the admissibility of evidence to explain a judgment and the motives of the debtor. In that case it appeared that the debt, which was merged in the judgment, represented property sold after the delivery of the deed; that is, the complainant was a subsequent creditor. The debtor was allowed to testify that he purchased the property as agent for

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[1] King v. Tharp, 26 Iowa 283.

[2] Vogt v. Ticknor, 48 N. H. 245; Church v. Chapin, 35 Vt. 231; N. Y. & Harlem R.R. Co. v. Kyle, 5 Bosw. (N. Y.) 587; Hills v. Sherwood, 48 Cal. 386; Law v. Payson, 32 Me. 521; Clark v. Anthony, 31 Ark. 546. See Goodnow v. Smith, 97 Mass. 69. See § 74, especially the note.

[3] Vogt v. Ticknor, 48 N. H. 247; Gregg v. Bigham, 1 Hill's (S. C.) Law 299; Collinson v. Jackson, 14 Fed. Rep. 309; S. C. 8 Sawyer 357; Clark v. Anthony, 31 Ark. 549; Carter v. Bennett, 4 Fla. 283. See Lewis v. Rogers, 16 Pa. St. 18; Sidensparker v. Sidensparker, 52 Me. 481; Clark v. Douglass, 62 Pa. St. 416; Wells v. O'Connor, 27 Hun (N. Y.) 428. Compare Voorhees v. Seymour, 26 Barb. (N. Y.) 569; Meeker v. Harris, 19 Cal. 278; Shaw v. Dwight, 27 N. Y. 245; Whittlesey v. Delaney, 73 N. Y. 571; Mandeville v. Reynolds, 68 N. Y. 545. "Fraud and imposition invalidate a judgment as they do all acts." Dobson v. Pearce, 12 N. Y. 165.

[4] See Guion v. Liverpool, L. & G. Ins. Co., 109 U. S. 173; Sidensparker v. Sidensparker, 52 Me. 487; Leonard v. Bryant, 11 Met. (Mass.) 370; Thomas v. Hubbell, 15 N. Y. 405; *Ex parte* Cutting, 94 U. S. 14.

[5] 65 N. Y. 471.

his son, and that he did no business for himself. Though the judgment was conclusive as establishing that he was liable for the debt, it was considered competent to show that the debtor acted as agent, and was not personally engaged in business, and hence did not contemplate future indebtedness, and had no design to defraud future creditors.[1]

§ 271. **Burden of proof.**—In general the obligation of proving a fact rests upon the party who substantially asserts the affirmative of the issue.[2] With the possible exception of conveyances to a wife by a husband,[3] the burden of proof, in cases where the instrument is valid upon its face, generally rests upon the creditor to show a fraudulent intent or absence of consideration.[4] A creditor may succeed under the statute in New York simply by proving a fraudulent intent.[5] If, however, the vendee having the burden thus cast upon him,[6] shows that valuable consideration was paid for the transfer of the property in controversy, then proof of the vendor's fraudulent intent is insufficient; there must be evidence of a fraudulent intent on the part of the vendee,[7] or proof that he had notice of the vendor's evil design.[8] Where a strong doubt of the integrity of the transaction is created, the duty of making full explanation, and the burden of proof to sustain the transfer, rests with

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[1] See Chap. VI., §§ 96–101.

[2] Greenl. Ev. § 74; Tompkins v. Nichols, 53 Ala. 197. The right to open and conclude especially on the trial and sifting of facts to unravel the subtleties of fraud, is an important legal right and if improperly denied demands the granting of a new trial. Royce v. Gazan, 76 Ga. 79.

[3] See Chap. XX.

[4] See §§ 5, 6. Fuller v. Brewster, 53 Md. 359; Cooke v. Cooke, 43 Md. 533; Anderson v. Roberts, 18 Johns. (N. Y.) 515; Mehlhop v. Pettibone, 54 Wis. 652; Starin v. Kelly, 88 N. Y. 421; Tompkins v. Nichols, 53 Ala. 197; Barkow v. Sanger, 47 Wis. 500; Kellogg v. Slauson, 11 N. Y. 304; Pusey v. Gardner, 21 W. Va. 476; Hale v. West Va. Oil & Land Co., 11 W. Va. 229; Kruse v. Prindle, 8 Oregon 158; Townsend v. Stearns, 32 N. Y. 209.

[5] Starin v. Kelly, 88 N. Y. 421.

[6] Throckmorton v. Rider, 42 Iowa 86.

[7] Jones v. Simpson, 116 U. S. 609.

[8] See Chap. XIV., §§ 196, 197.

the insolvent.[1] The fraud must be established by the party alleging it by a fair preponderance of proof.[2]

§ 272. Secret trust.—The most common forms of fraudulent conveyances are those in which a secret trust or benefit is reserved for the debtor. Manifestly the law will not permit an insolvent to sell his land and convey it without apparent reservation, and yet secretly retain for himself the right to occupy it for a limited time for his own benefit.[3] A transfer of this character, even though founded upon a good consideration, lacks the elements of good faith, is not what it purports to be, conceals the real agreement existing between the parties, confers upon the debtor the enjoyment of a valuable right which it is intended to place beyond the reach of creditors, and constitutes a fraud upon them.[4] It is immaterial whether the trust is express and apparent upon the face of the deed or is implied from extrinsic circumstances.[5] The whole estate of the debtor is in theory of law liable for the payment of his debts, and it is fraudulent to conceal or secrete any part of the insolvent's property from his creditors.[6] Where a father caused foreclosure proceedings to be brought against himself, and his son became the purchaser, and the creditors of the latter proceeded to acquire such interest, it was held that the father would not be permitted to give evidence of a secret trust in the son for the benefit of the father.[7]

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[1] Clements v. Moore, 6 Wall. 315. See also Piddock v. Brown, 3 P. Wms. 289; Wharton v. May, 5 Ves. 49.

[2] Brown v. Herr, 21 Neb. 128.

[3] Lukins v. Aird, 6 Wall. 79. See Wooten v. Clark, 23 Miss. 76; Arthur v. Commercial & R.R. Bank, 17 Miss. 394; Towle v. Hoit, 14 N. H. 61; Paul v. Crooker, 8 N. H. 288; Smith v. Lowell, 6 N. H. 67; Hills v. Eliot, 12 Mass. 26.

[4] See § 22. Young v. Heermans, 66 N. Y. 382; Crouse v. Frothingham, 27 Hun (N. Y.) 125; Dean v. Skinner, 42 Iowa 418; Sims v. Gaines, 64 Ala. 392–397; Rice v. Cunningham, 116 Mass. 469; Giddings v. Sears, 115 Mass. 505. See Macomber v. Peck, 39 Iowa 351.

[5] Coolidge v. Melvin, 42 N. H. 510; Rice v. Cunningham, 116 Mass. 469.

[6] Sparks v. Mack, 31 Ark. 670; Paul v. Crooker, 8 N. H. 288; Moore v. Wood, 100 Ill. 454; Conover v. Beckett, 38 N. J. Eq. 384. See Chap. II.

[7] Conover v. Beckett, 38 N. J. Eq. 384.

Secret trusts are manifestly most difficult to establish in court. Surrounding circumstances and the relations of the parties and their conduct and bearing may be given in evidence. Sometimes the isolated bits of evidence shadowing forth the secret arrangement or benefit seem most inconclusive and unsatisfactory, but when grouped together and considered as a whole the fraudulent device can be very clearly made to appear.

§ 273. **Proof of insolvency of debtor.**—The term insolvent is usually applied to one whose estate is not sufficient to pay his debts, or a person who is unable to pay all his debts from his own means.[1] On the other hand, a party is solvent who has property subject to legal process sufficient to satisfy all his obligations.[2] An embarrassed debtor may of course effect any sales of his property which he deems advantageous, to enable him to raise the necessary means for paying off his creditors, and, within reasonable restrictions, to prevent its sacrifice at forced sale under execution, and for this purpose the law generally recognizes his right to sell either for cash or on credit.[3]

Proof of insolvency of the debtor at the date of the alienation is frequently of vital importance in creditors' suits. How can the evidence upon this point be best adduced? The rule has been formulated that "the opinion of a witness that a person is solvent or insolvent is inad-

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[1] Riper v. Poppenhausen, 43 N. Y. 68; Marsh v. Dunckel, 25 Hun (N. Y.) 169, 170. See Buchanan v. Smith, 16 Wall. 308; Herrick v. Borst, 4 Hill (N. Y.) 652; Brouwer v. Harbeck, 9 N. Y. 594.

[2] Herrick v. Borst, 4 Hill (N. Y.) 652; approved, Walkenshaw v. Perzel, 32 How. Pr. (N. Y.) 240; Brouwer v. Harbeck, 9 N. Y. 594. See Eddy v. Baldwin, 32 Mo. 374; McKown v. Eurgason, 47 Iowa 637. The term "open and notorious insolvency," is said to imply not the want of sufficient property to pay all of one's debts, but the absence of all property within reach of the law, applicable to the payment of any debt. Hardesty v. Kinworthy, 8 Blackf. (Ind.) 304.

[3] Dougherty v. Cooper, 77 Mo. 531. See Hickey v. Ryan, 15 Mo. 62; Buckner v. Stine, 48 Mo. 407; Waddams v. Humphrey, 22 Ill. 663; Nelson v. Smith, 28 Ill. 495. See § 52.

missible."[1] In Denman v. Campbell[2] this question was put: "Is Donal Campbell a man of responsibility?" and the answer given under objection was: "So far as I know, he was not responsible." The reception of this evidence was held to be error. In a case which arose in New York, in which the primary and all-important question was whether a corporation was solvent or not, many of the witnesses examined on the point expressed nothing more than an opinion upon the subject, without referring to any facts from which such opinion was formed. It was very properly ruled that such evidence was entirely insufficient, and could never form a basis for any action of the court.[3] Evi-

[1] Lawson on Expert & Opinion Evidence, p. 515. Citing Brice v. Lide, 30 Ala. 647; Nuckolls v. Pinkston, 38 Ala. 615; Royall v. McKenzie, 25 Ala. 363. But see Breckinridge v. Taylor, 5 Dana (Ky.) 114; Crawford v. Andrews, 6 Ga. 244; Riggins v. Brown, 12 Ga. 273; Sherman v. Blodgett, 28 Vt. 149.

[2] 7 Hun (N. Y.) 88. In Babcock v. Middlesex Sav. Bank, 28 Conn. 306, the court said: "We think that the court below erred in receiving the opinion of the judge of probate as to the pecuniary ability of H. D. Smith, for the purpose of rebutting the evidence adduced by the defendants to show that he was destitute of property. The witness did not profess to have any knowledge whatever in regard to the property or pecuniary circumstances of Smith, or any means of forming a judgment or opinion on that subject, excepting from the style in which he and his family lived, the manner of his leaving the State, and the fact that he had made, before the court of probate, no disclosure of his property under oath, in the proceedings in insolvency against him. Although, as to the value of property we resort to the judgment or opinion of persons acquainted with it, its existence and ownership are facts to be proved, whether directly or otherwise, like other facts, by the knowledge of witnesses, and not by their opinions, inferences or surmises, derived from whatever source. The present is not like the cases where an opinion is sought of an expert; or those in which, for certain purposes, the reputation of a person as to pecuniary ability may be shown by witnesses who have no personal knowledge of his situation. The inquiry here was not whether Smith was reputed to be, but whether he was in fact, destitute of property. On such an inquiry nothing could be more dangerous than to receive the opinions of persons founded on such fallacious grounds as common rumor, or a man's professions as to his circumstances, or the representations or opinions of others, or, what in many cases is still less to be relied on, his style or manner of living."

[3] See Brundred v. Paterson Machine Co., 4 N. J. Eq. 295. Compare Nininger v. Knox, 8 Minn. 140; Andrews v. Jones, 10 Ala. 460. In Sherman v. Blodgett, 28 Vt. 149, the court said: "The solvency of an individual is a matter resting somewhat in opinion; and, in the present case, the witness

dence that a man was generally reputed to be insolvent is competent upon the theory that the fact to be proved is of a negative character, scarcely admitting of direct and positive proof.[1] In the great majority of cases it would be impracticable, and exceedingly tedious and expensive, to procure any other proof of insolvency than that of general reputation in the community where the debtor resides and is known.[2] If the witness is able to state numerous facts touching the property of the debtor, and the amount of his indebtedness, which show a very full and intimate acquaintance with his affairs and his utter insolvency, he may be permitted to answer a question whether or not the debtor was able to pay his debts at a particular time, in the usual course of business. This is considered as calling for a fact and not for the opinion of the witness.[3] We may here state that there is no presumption of law, arising from knowledge of insolvency, that the assignee knew of the debtor's intention to defraud creditors.[4]

§ 274. **Insolvency of vendee.**—The ability of the vendee to pay the purchase-money for the property before and at the time of the transaction, is a material circumstance for the consideration of the jury, and testimony upon that point should be admitted.[5] For the purpose of showing

had stated what property the bail owned at the time he entered bail, and his means of knowing the situation and circumstances of the bail; certainly there could then be no objection to his giving his opinion from his knowledge of the bail, and of his affairs, what he thought he was worth."

[1] Nininger v. Knox, 8 Minn. 148; Griffith v. Parks, 32 Md. 4; Crawford v. Berry, 6 Gill & J. (Md.) 63; Metcalf v. Munson, 10 Allen (Mass.) 493; Bank of Middlebury v. Rutland, 33 Vt. 414; Lee v. Kilburn, 3 Gray (Mass.) 594.

[2] Griffith v. Parks, 32 Md. 4; Watkins v. Worthington, 2 Bland (Md.) 509, 540, 541.

[3] Thompson v. Hall, 45 Barb. (N. Y.) 216. See Blanchard v. Mann, 1 Allen (Mass.) 433; Iselin v. Peck, 2 Rob. (N. Y.) 629.

[4] Cannon v. Young, 89 N. C. 264. On the issue whether a conveyance of real estate is fraudulent as to creditors, evidence of the register of deeds for the district in which the estate lies, that he has searched the records of the registry, and found that there was no other property standing in the name of the grantor, is admissible. Bristol Co. Sav. Bank v. Keavy, 128 Mass. 298.

[5] Johnson v. Lovelace, 51 Ga. 19.

that a mortgage is fraudulent, it is competent to prove that in the country where the mortgagee was born and grew up, and continued to reside, he was never known to have any property or means, or to be engaged in any business,[1] and was not in a position to lend money.[2] So the creditor may show that the grantee was a married woman, having no separate estate, notoriously poor, and destitute of means to make the payment claimed or contemplated.[3] Testimony of this kind is often of vital importance to creditors, as nothing is more common, or more persuasive to the minds of a court or a jury as to the presence of fraud, than proof that the debtor's property has passed into the hands of an irresponsible figurehead who was not possessed of the means with which to purchase it, and had no use for it.

§ 275. **General reputation.**—Evidence of the general reputation of all the parties to an alleged fraudulent transaction, as to their credit and pecuniary responsibility, may be admitted.[4] In this respect the general reputation of the grantor is a fact which, with other circumstances, has some tendency to show that the grantee understood his motives in making the conveyance, and possibly participated in his unlawful purpose; and proof of the grantee's want of credit would have a tendency to show that the conveyance was not made in good faith, especially if made in reliance upon his future ability to pay.[5] Evidence that the grantee's general credit was bad, though somewhat remote, cannot be said to be incompetent.[6] Where fraud is charged and sought to be established by proof of circumstances, evi-

[1] Stebbins v. Miller, 12 Allen (Mass.) 597.

[2] Demeritt v. Miles, 22 N. H. 523.

[3] Amsden v. Manchester, 40 Barb. (N. Y.) 163. See S. P. Danby v. Sharp, 2 MacAr. (D. C.) 435; Stevens v. Dillman, 86 Ill. 233; Castle v. Bullard, 23 How. 186.

[4] Hall v. Ritenour, 2 West. Rep. 496; S. C. *sub nom.* Gordon v. Ritenour, 87 Mo. 54.

[5] Sweetser v. Bates, 117 Mass. 468.

[6] Cook v. Mason, 5 Allen (Mass.) 212. Compare Lee v. Kilburn, 3 Gray (Mass.) 594; Metcalf v. Munson, 10 Allen (Mass.) 491; Amsden v. Manchester, 40 Barb. (N. Y.) 163.

dence of general good character is admissible to repel it, as in criminal cases.[1]

§ 276. **Concerning res gestæ.**—Where it becomes necessary to discover the intention of a person, or to investigate the nature of a particular act, evidence of what the person said at the time of doing it is received as part of the *res gestæ*.[2] This important doctrine has been liberally applied in the United States, and especially in the class of litigation under consideration. Thus a wife may employ her husband as an agent, and his utterances while so acting, in taking a bill of sale, constitute part of the *res gestæ* and are competent evidence for the wife.[3] The declarations accompanying an act are admissible as explanatory of the character and motives of the act.[4] They in this way become part of the *res gestæ*. It is the duty of the jury to determine the weight of these declarations, by ascertaining whether they were sincere or were made to withdraw attention from the real nature of the act, or to hide the real purpose of it.[5] But declarations which are merely narrative of a *past* transaction are not admissible as part of the *res gestæ*.[6]

§ 277. **Declarations before sale—Realty and personalty.**—The conduct and declarations of the grantor respecting the estate conveyed, tending to prove a fraudulent intention on his part before the conveyance, are proper evidence for the jury upon an inquiry into the validity of the conveyance by a creditor or subsequent purchaser, who alleges that it is fraudulent.[7] This evidence is considered compe-

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[1] Werts v. Spearman, 22 S. C. 219.

[2] Waldele v. New York Central & H. R. R.R. Co., 95 N. Y. 274; Hanover Railroad Co. v. Coyle, 55 Pa. St. 396; Loos v. Wilkinson, 110 N. Y. 211; Moore v. Meacham, 10 N. Y. 207; Schnicker v. People, 88 N. Y. 192; Swift v. Mass. Mutual Life Ins. Co., 63 N. Y. 186.

[3] Kelly v. Campbell, 1 Keyes (N. Y.) 29.

[4] See Stewart v. Fenner, 81 Pa. St. 177.

[5] Potter v. McDowell, 31 Mo. 74.

[6] Waldele v. New York Central & H. R. R.R. Co., 95 N. Y. 274.

[7] Bridge v. Eggleston, 14 Mass. 245, per Parker, C. J.; s. c. 7 Am. Dec. 209.

tent to prove that the conveyance was fraudulent on the part of the grantor, and does not prejudice the grantee, who is not affected if he is a *bona fide* purchaser for a valuable consideration. To avoid the transaction as covinous fraudulent intent must, as we have said, be shown on the part of the grantee as well as of the grantor.[1] So admissions made by one who, at the time, held the title to land, to the effect that he had contracted to sell it to another, and had received payment for it, are competent evidence against those claiming title under him.[2] The principle upon which such evidence is received is that the declarant was so situated that he probably knew the truth, and his interests were such that he would not have made the admissions to the prejudice of his title or possession unless they were true. The regard which one so situated would have for his own interest is considered sufficient security against falsehood. In New York, after some uncertainty, the rule was finally settled[3] that such admissions in controversies concerning personal property would be excluded.[4]

§ 278. **Declarations of debtor after sale.**—As a general rule the declarations of a vendor, after transfer and delivery

See Alexander v. Caldwell, 55 Ala. 517; Knox v. McFarran, 4 Col. 596; Randegger v. Ehrhardt, 51 Ill. 101; Chase v. Chase, 105 Mass. 388; Stowell v. Hazelett, 66 N. Y. 635; Davis v. Stern, 15 La. Ann. 177; McKinnon v. Reliance Lumber Co., 63 Texas 31. See Elliott v. Stoddard, 98 Mass. 145; McLane v. Johnson, 43 Vt. 48; Wyckoff v. Carr, 8 Mich. 44. In Truax v. Slater, 86 N. Y. 632, Earl, J., is reported in memorandum to have said: "The mere declarations of an assignor of a chose in action, forming no part of any *res gestæ*, are not competent to prejudice the title of his assignee, whether the assignee be one for value, or merely a trustee for creditors, and whether such declarations be antecedent or subsequent to the assignment." See Bush v. Roberts, 111 N. Y. 278. This statement of the rule would seem to be inaccurate. While a party holds the title and possession it would clearly seem to be competent to give evidence of his declarations made while the possession continued as characterizing the nature of it. Compare in this connection Von Sachs v. Kretz, 72 N. Y. 548; Loos v. Wilkinson, 110 N. Y. 195; Clews v. Kehr, 90 N. Y. 633.

[1] Carpenter v. Muren, 42 Barb. (N. Y.) 300; Hughes v. Monty, 24 Iowa 499. See Chap. XIV.

[2] Chadwick v. Fonner, 69 N. Y. 404.

[3] Paige v. Cagwin, 7 Hill (N. Y.) 361; Chadwick v. Fonner, 69 N. Y. 407.

[4] Chadwick v. Fonner, 69 N. Y. 407.

of possession, cannot be given in evidence against the vendee.[1] Such declarations are mere hearsay,[2] and not made under the sanction of an oath; the debtor bears no relation to the estate, and it has been frequently held that exceptions to the exclusion of this class of evidence should not be multiplied. A vendor after parting with his property has no more power to impress the title, either by his acts or utterances, than a mere stranger.[3] The declarations

[1] Tilson v. Terwilliger, 56 N. Y. 277; Cuyler v. McCartney, 40 N. Y. 221; Chase v. Horton, 143 Mass. 118; Roberts v. Medbery, 132 Mass. 100; Winchester & Partridge Mfg. Co. v. Creary, 116 U. S. 161; Burnham v. Brennan, 74 N. Y. 597; Redfield v. Buck, 35 Conn. 328; Tabor v. Van Tassell, 86 N. Y. 642; Randegger v. Ehrhardt, 51 Ill. 101; Kennedy v. Divine, 77 Ind. 493; Garner v. Graves, 54 Ind. 188; Hirschfeld v. Williamson, 1 West Coast Rep. 150; Meyer v. Va. & T. R.R. Co., 16 Nev. 343; Sumner v. Cook, 12 Kans. 165; Scheble v. Jordan, 30 Kans. 353. In Holbrook v. Holbrook, 113 Mass. 76, Ames, J., said: "It has often been held, and is a well-established rule, that upon the trial of the question whether a particular conveyance was made to defraud creditors, it is not competent to show the acts or declarations of the grantor after the conveyance, to impair or affect the title of the grantee." Citing Bridge v. Eggleston, 14 Mass. 245; Foster v. Hall, 12 Pick. (Mass.) 89; Aldrich v. Earle, 13 Gray (Mass.) 578; Taylor v. Robinson, 2 Allen (Mass.) 562. See Clements v. Moore, 6 Wall. 299; Lewis v. Wilcox, 6 Nev. 215; Thornton v. Tandy, 39 Tex. 544; Pier v. Duff, 63 Pa. St. 59; City Nat. Bank v. Hamilton, 34 N. J. Eq. 163; Garrahy v. Green, 32 Tex. 202; Taylor v. Webb, 54 Miss. 36; Warren v. Williams, 52 Me. 346; Bullis v. Montgomery, 50 N. Y. 358; Wadsworth v. Williams, 100 Mass. 126; Winchester v. Charter, 97 Mass. 140. Compare Truax v. Slater, 86 N. Y. 630; Bullis v. Montgomery, 50 N. Y. 358.

[2] In Winchester & Partridge Mfg. Co. v. Creary, 116 U. S. 165, the court said: "The plaintiff was itself in actual possession, exercising by its agent full control. The vendors, it is true, entered plaintiff's service as soon as the sale was made and possession was surrendered, but only as clerks or salesmen, with no authority except such as employees of that character ordinarily exercise. What they might say, not under oath, to others, after possession was surrendered, as to the real nature of the sale, was wholly irrelevant. They were competent to testify under oath, and subject to cross-examination, as to any facts immediately connected with the sale, of which they had knowledge; but their statements out of court, they not being parties to the issues to be tried, were mere hearsay. After the sale, their interest in the property was gone. Having become strangers to the title, their admissions are no more binding on the vendee than the admissions of others. It is against all principle that their declarations, made after they had parted with the title and surrendered possession, should be allowed to destroy the title of their vendee."

[3] Stewart v. Thomas, 35 Mo. 207.

of a former owner to qualify or disparage his title are only admissible when made while the title is in him. Such utterances cannot be allowed to affect a title which is subsequently acquired.[1] The declarations of the grantee while on his way to the magistrate to obtain the acknowledgment of the grantor, and before the deeds were delivered, substantially to the effect that the deeds were being executed because of apprehensions on the part of the grantor that the property would be taken to satisfy the debt due the demandant were excluded, because the deed had not been delivered at the time the declarations were made, and it was clear that "as admissions in disparagement of title, the evidence was not competent."[2]

§ 279. **Possession after conveyance.**—Elsewhere in this discussion the failure to effect a change of possession is shown to raise either a *prima facie* or absolute presumption of fraud.[3] As proof of the continued possession of the vendor is competent evidence to impeach the supposed transfer, it would seem to follow that any acts or declarations of the possessor while so retaining the property must also be competent as characterizing his possession.[4] So long as the debtor remains in possession of property which once belonged to him, and which his creditor is seeking to

[1] Noyes v. Morrill, 108 Mass. 396; Stockwell v. Blamey, 129 Mass. 312.

[2] Stockwell v. Blamey, 129 Mass. 312.

[3] See Chap. XVII., §§ 248–252.

[4] Kirby v. Masten, 70 N. C. 540; Carnahan v. Wood, 2 Swan (Tenn.) 502; Yates v. Yates, 76 N. C. 142; Haenschen v. Luchtemeyer, 49 Mo. 51; Carney v. Carney, 7 Bax. (Tenn.) 287; Tedrowe v. Esher, 56 Ind. 447: United States v. Griswold, 8 Fed. Rep. 560; Cahoon v. Marshall, 25 Cal. 202; Oatis v. Brown, 59 Ga. 716; Mills v. Thompson, 72 Mo. 369; Adams v. Davidson, 10 N. Y. 309. See Knight v. Forward, 63 Barb. (N. Y.) 311; Hilliard v. Phillips, 81 N. C. 104, Smith, C. J., dissenting upon the ground that the declarations in this latter case did not qualify or explain the possession, nor disparage declarant's title, but related to a pre-existing fact to impeach the validity and effect of his own act in conveying title. Its incompetency for such a purpose he considered fully established by the authorities. 1 Greenl. Ev. §§ 109, 110; Ward v. Saunders, 6 Ired. (N. C.) Law 382; Wise v. Wheeler, 6 Ired. (N. C.) Law 196; Hodges v. Spicer, 79 N. C. 223; Burbank v. Wiley, 79 N. C. 501.

condemn as fraudulently conveyed, the *res gestæ* of the fraud, if any, may be considered as in progress, and his declarations, though made after he has parted with the formal paper title, may be given in evidence for the creditor against the claimant,[1] by reason of the continuous possession which accompanied them. Where the assignor continues in possession of the assigned property, his acts and declarations while in actual possession may be given in evidence as part of the *res gestæ*,[2] especially if there is absolutely no break made in the continuity of the possession after the real or pretended sale.[3] The declarations are received in such cases upon the ground that they show the nature, object, or motives of the act which they accompany, and which is the subject of inquiry. To be a part of the *res gestæ*, however, the declarations must be made at the time the act was done which they are supposed to characterize; they must be calculated to unfold the nature and quality of the facts which they purport to explain; and must harmonize with such facts so as to form one transaction.[4] The declarations must be concomitant with the principal act or transaction of which they are considered a part, and so connected with it as to be regarded as the result and consequence of co-existing motives.[5]

§ 280. **Declarations of co-conspirators.**—Where it is proved that the debtor and others have joined in a conspiracy to defraud creditors by a fraudulent disposition of property, the acts and declarations of either of the parties, made in

[1] Williams v. Hart, 10 Rep. 74; citing Oatis v. Brown, 59 Ga. 716.

[2] Newlin v. Lyon, 49 N. Y. 661; Williamson v. Williams, 11 Lea (Tenn.) 368; Trotter v. Watson, 6 Humph. (Tenn.) 509.

[3] Adams v. Davidson, 10 N. Y. 309.

[4] Tilson v. Terwilliger, 56 N. Y. 277. See Enos v. Tuttle, 3 Conn. 250.

[5] In Towne v. Fiske, 127 Mass. 125, it is said that the mere fact that a person, pending a suit against him, is in possession of personal property which he has sold and constructively delivered, is not *prima facie* evidence that the sale is fraudulent as against a creditor. This is certainly a border case. The effect of the failure to change possession is elsewhere considered. See Chap. XVII.

the execution of the common purpose, and in aid of its fulfilment, are competent evidence against any of the parties.[1] Nor is it of consequence that the particular declarations under consideration were in reference merely to proposed acts of fraud which may not have been consummated in the particulars proposed, if such proposed acts were *sui generis* with those committed. A foundation must first be laid, by proof, sufficient to establish *prima facie* the fact of the conspiracy alleged in the complaint. That being done, every declaration of the participants in reference to the common object is admissible in evidence. It makes no difference at what time the defendant joins the conspiracy. Every one who enters into a common design is generally deemed in law a party to every act which has before been done by the others, in furtherance of the common design; and this rule extends to declarations.[2] The statements of one of the co-conspirators, however, as to past transactions not connected with or in furtherance of the enterprise under investigation, are not competent.[3]

In case of conspiracy, where the combination is proved, the acts and declarations of the conspirators are not received as evidence of that fact, but only to show what was done, the means employed, the particular design in respect to the parties to be affected or wronged, and generally those details which, assuming the combination and the illegal purpose, unfold its extent and scope, and its influence either upon the public or the individuals who suffer

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[1] Dewey v. Moyer, 72 N. Y. 79, 80. See Newlin v. Lyon, 49 N. Y. 661; Cuyler v. McCartney, 40 N. Y. 221, per Woodruff, J.; Tedrowe v. Esher, 56 Ind. 445; Sherman v. Hogland, 73 Ind. 472; Stewart v. Johnson, 18 N. J. Law 87; Lee v. Lamprey, 43 N. H. 13; Kennedy v. Divine, 77 Ind. 493; Adams v. Davidson, 10 N. Y. 309; N. Y. Guaranty, etc. Co. v. Gleason, 78 N. Y. 503; Daniels v. McGinnis, 97 Ind. 552. See Kelley v. People, 55 N. Y. 565.

[2] Tyler v. Angevine, 15 Blatchf. 541; 1 Greenleaf's Ev. § 111.

[3] N. Y. Guar. & Ind. Co. v. Gleason, 78 N. Y. 503. See Johnston v. Thompson, 23 Hun (N. Y.) 90; Baptist Church v. Brooklyn F. I. Co., 28 N. Y. 153; Cortland Co. v. Herkimer Co., 44 N. Y. 22.

from the wrong, or show the *execution* of the illegal design. But when the only issue is whether there was a conspiracy to defraud, these declarations do not become evidence to establish it.[1] The court may in its discretion receive the declaration first and the evidence of connection subsequently,[2] though it is conceded that the rule calling for preliminary proof should not be departed from except under particular and urgent circumstances. It has been said that the testimony of one witness is enough to let in the acts and declarations of a wrong-doer, and that the court will not decide upon the question of his credibility ;[3] and in Pennsylvania the rule seems to prevail that the least degree of concert or collusion between parties to an illegal transaction makes the act of one the act of all.[4]

§ 281. **Proof of circumstances.**—In litigations of the class under consideration, great latitude should undoubtedly be allowed in regard to the admission of circumstantial evidence for the purpose of proving participation in manifest fraud.[5] Objections to testimony as irrelevant are not

Whart. Cr Evid. § 25

[1] Woodruff, J., in Cuyler v. McCartney, 40 N. Y. 229; Boyd v. Jones, 60 Mo. 454; N. Y. Guaranty, etc. Co. v. Gleason, 7 Abb. N. C. (N. Y.) 334; Kennedy v. Divine, 77 Ind. 493. In Winchester & Partridge Mfg. Co. v. Creary, 116 U. S. 166, the court said: "Without extending this opinion by a review of the adjudged cases in which there was proof of concert or collusion between vendor and vendee to defraud creditors, and in which subsequent declarations of the vendor were offered in evidence against the vendee to prove the true character of the sale, it is sufficient to say that such declarations are not admissible against the vendee, unless the alleged common purpose to defraud is first established by independent evidence, and unless they have such relation to the execution of that purpose that they fairly constitute a part of the *res gestæ*. There was no such independent evidence in this case, and there is no foundation for the charge of a conspiracy between the vendors and vendee to hinder creditors, outside of certain statements which Webb is alleged to have made after his firm had parted with the title and surrendered possession."

[2] Place v. Minster, 65 N. Y. 89.

[3] Abney v. Kingsland, 10 Ala. 355, 361.

[4] Confer v. McNeal, 74 Pa. St. 115; Gibbs v. Neely, 7 Watts (Pa.) 307; Rogers v. Hall, 4 Watts (Pa.) 361; McDowell v. Rissell, 37 Pa. St. 164; Hartman v. Diller, 62 Pa. St. 37.

[5] Curtis v. Moore, 20 Md. 96; Shealy v. Edwards, 75 Ala. 416. See § 13. Engraham v. Pate, 51 Ga. 537.

favored in such cases, since the force of circumstances depends so much upon their number and connection.[1] The evidence should be permitted to take a wide range, as in most cases fraud is predicated of circumstances, and not upon direct proof.[2] Proof is said to establish the truth, and circumstantial evidence to lead toward it; hence any pertinent and legitimate facts, conducing to the proof of a litigated issue, constitute evidence of the disputed fact, stronger or weaker, according to the entire character and complexion of it, or as affected by conflicting evidence.[3] Though the evidence to prove fraud may be circumstantial and presumptive, it "must be strong and cogent, such as to satisfy a man of sound judgment of the truth of the allegation."[4] But the allegation of fraud in a civil action need not, like the charge of crime, be proved by evidence excluding all reasonable doubt; a preponderance of evidence will suffice.[5] So it is not error to refuse to charge a jury that "they must be satisfied from the clearest and most satisfactory evidence," since it is the province of the jury to weigh the evidence.[6] "Circumstantial evidence," said Bradley, J., "is not only sufficient, but in most cases it is the only proof that can be adduced."[7] Often other things which go to characterize a transaction are more convincing than the positive evidence of any single witness, especially of an interested witness.[8] The only true test is whether the evidence can throw light on the transaction, or whether it is totally irrelevant.[9] It is the duty of the court,

[1] Sarle v. Arnold, 7 R. I. 586; Castle v. Bullard, 23 How. 187.

[2] Ferris v. Irons, 83 Pa. St. 182. See Wright v. Linn, 16 Tex. 34.

[3] Miles v. Edelen, 1 Duv. (Ky.) 270.

[4] Henry v. Henry, 8 Barb. (N. Y.) 592.

[5] Strader v. Mullane, 17 Ohio St. 626.

[6] Painter v. Drum, 40 Pa. St. 467.

[7] Rea v. Missouri, 17 Wall. 543. See Cooke v. Cooke, 43 Md. 525; King v. Poole, 61 Ga. 374; Sarle v. Arnold, 7 R. I. 585; Castle v. Bullard, 23 How. 187; Winchester v. Charter, 102 Mass. 275, 276; White v. Perry, 14 W. Va. 66; Butler v. Watkins, 13 Wall. 456.

[8] Molitor v. Robinson, 40 Mich. 202. See Blue v. Penniston, 27 Mo. 274.

[9] Heath v. Page, 63 Pa. St. 108–126, and cases cited. See Stewart v. Fenner, 81 Pa. St. 177; Booth v. Bunce, 33 N. Y. 159.

however, to see that such evidence has at least a natural and reasonable tendency to sustain the allegations in support of which it is introduced; that it is of such a character as to warrant an inference of the fact to be proved, and amounts to something more than a mere basis for conjecture or vague speculation.[1] Evidence may be legally admissible as tending to prove a particular fact which by itself is utterly insufficient for that purpose. "It may be a link in the chain, but it cannot make a chain unless other links are added."[2] So in England it is settled that the preliminary question of law for the court is not whether there is absolutely no evidence, but whether there is none that ought reasonably to satisfy the jury that the fact sought to be proved is established. If there is evidence on which the jury can properly find for the party on whom the *onus* of proof lies, it should be submitted; if not, it should be withdrawn from the jury.[3]

Greater latitude is undoubtedly allowable in the cross-examination of a party who places himself upon the stand than in that of other witnesses.[4] The cross-examination of

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[1] Battles v. Laudenslager, 84 Pa. St. 451.

[2] Howard Express Co. v. Wile, 64 Pa. St. 206.

Latitude of the inquiry.—In Baltimore & Ohio R.R. Co. v. Hoge, 34 Pa. St. 221, Thompson, J., said: "It is a great error, generally insisted on by defendants, in cases involving questions of fraud, that each item of testimony is to be tested by its own individual intrinsic force, without reference to anything else in the case; and if on such a test it does not prove fraud, it must be excluded. The system of destroying in detail forces designed for concentrated action does well, doubtless, in military operations; but a skillful general never suffers such a disastrous result, except when he cannot prevent it. Courts have the power, and must prevent such a system of assault, otherwise fraud would ever be victorious. It is a subtle element, and is to be traced out, if at all, by the small indices discoverable by the wayside where it travels; and to enable courts and juries to detect it, they must in most cases aggregate many small items, before the true features of it are discernible. Hence it is that great latitude in the investigation is a rule never departed from in such cases. This rule is elementary, and a citation of authorities to prove it would not only be useless, but superfluous."

[3] Ryder v. Wombwell, L. R. 4 Exch. 39; Jewell v. Parr, 13 C. B. 916.

[4] Rea v. Missouri, 17 Wall. 542.

a witness not a party is usually confined within the scope of the direct examination.[1] Then again proof of collateral facts tending to show a fraudulent intention is held to be admissible whenever a fraudulent intention is to be established.[2] The fact that at the time of the sale suits were pending against the debtor, or that he was apprehensive suits would be commenced, and also his general pecuniary condition, are matters which the creditor should be permitted to show.[3]

The maxim "*Omnia præsumuntur contra spoliatorem*" is frequently invoked by creditors in cases where the debtor or those acting in collusion with him have spirited away witnesses, or altered, destroyed, or suppressed documents.[4] And curiously enough the maxim "*De minimus non curat lex*" has been applied where the sum claimed to have been misappropriated by the debtor was insignificant in amount.[5]

We have already glanced at the effect of inadequacy of consideration,[6] and have seen that it may be so gross as to shock the conscience and furnish decisive evidence of fraud.[7] In an Oregon case this language occurs: "The fact that one person has obtained the property of another, under a form of purchase, without having paid any consideration therefor, and with a design of acquiring it for nothing, is fraudulent in itself."[8]

§ 282. **Other frauds.**—It is competent, in order to establish the fraudulent intent of the debtor, to give proof of

[1] Rea v. Missouri, 17 Wall. 542; Johnston v. Jones, 1 Black 216; Teese v. Huntingdon, 23 How. 2.

[2] United States v. 36 Barrels of High Wines, 7 Blatchf. 474; Wood v. United States, 16 Pet. 342-361.

[3] Harrell v. Mitchell, 61 Ala. 278. See Chap. XVI.

[4] See Wardour v. Berisford, 1 Vern. 452; Attorney General v. Dean of Windsor, 24 Beav. 679; Armory v. Delamirie, 1 Stra. 505. Compare State of Michigan v. Phœnix Bank, 33 N. Y. 9. But we cannot enter this wide field. See 18 Am. Law Rev. 185.

[5] Crook v. Rindskopf, 105 N. Y. 484.

[6] See § 232; Archer v. Lapp, 12 Ore. 202.

[7] See Pomeroy's Eq. Jur., § 927.

[8] Archer v. Lapp, 12 Ore. 202.

other fraudulent sales effected about the same time, and of his proposals to make other covinous alienations, together with his statements and declarations showing such intent.[1] Johnson, J., said:[2] "In actions involving questions of fraud, the intent is always a material inquiry, and for the purpose of establishing that, other acts of a similar character, about the same time, may always be shown."[3] This is especially the rule where there is any relation or connection between the different transactions,[4] or they form any part of a connected scheme to defraud.[5] When the motives and intent of the parties to an act become material, they may be shown by separate and independent acts and declarations accompanying or preceding the act in question. How far back such proof may extend must depend upon the nature and circumstances of each particular case, and no positive rule can be laid down. In the case of fraudulent conveyances the proof will usually be limited to similar acts occurring about the same time.[6]

It has been considered, however, not competent for a party imputing fraud to another to offer evidence to prove that the other dealt fraudulently at other times and in transactions wholly disconnected with the one under consideration. It is believed that such testimony would tend to prejudice the minds of the jury by impeaching the general character of the party charged with the fraud, when he had no right to expect such an attack, and could not be prepared to defend himself, however unimpeachable his conduct might have been.[7]

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[1] Pomeroy v. Bailey, 43 N. H. 125, and cases cited; Blake v. White, 13 N. H. 267; Pierce v. Hoffman, 24 Vt. 527. But see Staples v. Smith, 48 Me. 470; Huntzinger v. Harper, 44 Pa. St. 204; McCabe v. Brayton, 38 N. Y. 198; Withrow v. Biggerstaff, 87 N. C. 176.

[2] Amsden v. Manchester, 40 Barb. (N. Y.) 163.

[3] Warren v. Williams, 52 Me. 346; Flagg v. Willington, 6 Me. 386.

[4] Erfort v. Consalus, 47 Mo. 212.

[5] Smith v. Schwed, 9 Fed. Rep. 483; Clarke v. White, 12 Pet. 193.

[6] Pomeroy v. Bailey, 43 N. H. 125.

[7] Somes v. Skinner, 16 Mass. 360; Grant v. Libby, 71 Me. 430.

§ 283. **Suspicions insufficient.**—Mere suspicion of the existence of fraud, as we have said,[1] is not sufficient to establish its existence, but it must be clearly and satisfactorily shown. The evidence must convince the understanding that the transaction was entered into for a purpose prohibited by law.[2] Tangible facts must be adduced from which a legitimate inference of a fraudulent intent can be drawn.[3] Again circumstances amounting to a suspicion of fraud are not to be deemed notice of it, and where an inference of notice is to affect an innocent purchaser, it must appear that the inquiry suggested would have resulted, if fairly pursued, in the discovery of the defect or fraud.[4] The transaction will not be overturned even though the court finds "that there is ground of suspicion."[5]

§ 284. **Proving value.**—As we have seen, the value of the assigned property is always important in the question

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[1] Sherman v. Hogland, 73 Ind. 472; Clark v. Krause, 2 Mackey (D. C.) 565; Jaeger v. Kelley, 52 N. Y. 274. See §§ 5, 6.

[2] Pratt v. Pratt, 96 Ill. 184.

[3] Sherman v. Hogland, 73 Ind. 477; Jaeger v. Kelley, 52 N. Y. 274. See Chap. XVI.

[4] Simms v. Morse, 4 Hughes 583. See Ledyard v. Butler, 9 Paige (N. Y.) 132.

[5] Parker v. Phetteplace, 1 Wall. 685. Mr. Jenks, the learned counsel for the creditor in this action, relied largely upon the suspicious circumstances in evidence, and urged that proof of a covenant to commit the fraud could not be adduced, nor even proof of words. Some of the greatest crimes which power has ever commanded have been consummated without a word of direct instruction. The learned reporter in a note to this case aptly quotes from King John, Act III., Scene III.:

King John. . . . .
"Hear me without thine ears, and make reply
Without a tongue, using conceit alone,
Without eyes, ears, and harmful sound of words;
Then, in despite of broad-eyed watchful day,
I would into thy bosom pour my thoughts;
But ah, I will not:— . . . .
Dost thou understand me?
Thou art his keeper.
Hubert. And I will keep him so,
That he shall not offend your majesty."

Again, after the murder, Act IV., Scene II.

King John. . . . .
"Hadst thou but shook thy head, or made a pause,
When I spake darkly what I purposed;
Or turn'd an eye of doubt upon my face,
As bid me tell my tale in express words;
Deep shame had struck me dumb, made me break off,
And those thy fears might have wrought fears in me:
But thou didst understand me by my signs,
And didst in signs again parley with sin,
Yea, without stop, didst let thy heart consent,
And, consequently, thy rude hand to act
The deed which both our tongues held vile to name.—"

of fraud.[1] Experts may be called to prove value. In Bristol Co. Savings Bank v. Keavy[2] the witness was a real estate broker and auctioneer, and was accustomed to sell and value lands in various parts of the city in which the property was located, and had appraised land on the street where the premises were situated. He was held to be plainly qualified to testify as to the value of the land.

§ 285. **Testimony must conform to pleadings.**—The complainant will only be allowed to prove the truth of the allegations contained in his bill. Evidence relating to other matters will be excluded upon well-established principles of pleading which require the complainant to state the case upon which he seeks relief, to the end that the court may learn from the pleading itself whether the creditor is entitled to the relief prayed, and that the defendant may be advised as to the matters against which he is to defend.[3] Facts admitted in the pleading cannot be contradicted or varied by evidence.

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[1] Stacy v. Deshaw, 7 Hun (N. Y.) 451. See §§ 23, 41.

[2] 128 Mass. 303.

[3] Parkhurst v. McGraw, 24 Miss. 139.

CHAPTER XIX.

DEFENSES.

§ 286. As to defenses.
286*a*. Another action pending.
287. Laches.
288. } Lapse of time.
289. }
290. Discovery of the fraud.
291. Judge Blatchford's views.
292. Statute of limitations.
§ 293. Limitations in equity.
294. Insolvency or bankruptcy discharges.
295. Existing and subsequent creditors.
296. Sufficient property left—Gift of land.
297. What sheriff must show against stranger.

§ 286. **As to defenses.**—The principal defenses interposed in suits prosecuted to annul fraudulent transfers, as is elsewhere shown, are, that the purchaser acquired the title or property *bona fide*, without notice of, or participation in, the grantor's fraudulent intent, and that adequate consideration was paid or given for it. The principles and authorities governing these branches of our investigation have been considered of sufficient moment to call for treatment in separate chapters,[1] and need not be again discussed, but there are certain lines of defense common to this class of litigation which command at least passing attention. It may be observed at the outset that the fact that forms of law have been pursued is no protection in a court of equity, if the result aimed at, and reached, is a fraud.[2] The transaction must be judged by its real character, rather than by the form and color which the parties have seen fit to give it.[3] What cannot be done directly can-

[1] See Chaps. XV., XXIV.

[2] Metropolitan Bank v. Durant, 22 N. J. Eq. 35, 41.

[3] Quackenbos v. Sayer, 62 N. Y. 346; Vreeland v. New Jersey Stone Co., 29 N. J. Eq. 190; Fiedler v. Darrin, 50 N. Y. 440, where the rule is applied to usurious transactions. Judgment-creditors are considered to be acting in privity with their debtor in attacking

not be done by indirection; and when fraud appears the forms will be discarded and the corrupt act exposed and punished.[1]

§ 286*a*. **Another action pending.**—The general and salutary principle of procedure that no person shall be twice vexed for the same cause, of course applies to proceedings instituted by creditors. Thus in a case which arose in Pennsylvania where a creditor's bill was filed against directors of an insolvent bank charging mismanagement of its affairs, and an assignee of the bank subsequently brought an action at law in the name of the bank against the directors for the same cause, it was held that the pendency of the bill was well pleaded in abatement in the action at law.[2]

§ 287. **Laches.**—We have elsewhere discussed the cases relating to the sufficiency of pleas excusing apparent laches in filing a bill to annul a fraudulent transfer.[3] Endeavoring to avoid unnecessary repetition, let us recur to the subject of laches considered as a defense or bar to a suit. "Courts of equity do not impute laches by an iron rule. Circumstances are allowed to govern every case."[4] It may be asserted at the outset that equity will not be moved to set aside a fraudulent transaction at the suit of one who, after he had knowledge of the fraud, or after he was put upon inquiry with the means of knowledge accessible to him, has been quiescent during a period longer than that fixed by the statute of limitations.[5] A stale and uncertain de-

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or defending any usurious contract which he may have made. Chandler v. Powers, 24 N. Y. Daily Reg., p. 1201 (Dec. 28, 1883). See Merchants' Exch. Nat. Bk. v. Com. Warehouse Co., 49 N. Y. 642, and note. It seems that it is not a fraud upon creditors for a debtor or assignor to provide for the payment of a usurious debt. See Chapin v. Thompson, 89 N. Y. 271; Murray v. Judson, 9 N. Y. 73.

[1] Buck v. Voreis, 89 Ind. 117.

[2] Warner v. Hopkins, 111 Pa. St. 328.

[3] See §§ 148, 149.

[4] Waterman v. Sprague Manuf. Co., 55 Conn. 574.

[5] Burke v. Smith, 16 Wall. 401. Compare Meader v. Norton, 11 Wall. 443; Trenton Banking Co. v. Duncan, 86 N. Y. 221.

mand, as for instance, a bill filed to set aside an alleged fraudulent conveyance nineteen years old, should not be allowed in a court of equity.[1] In Eigleberger v. Kibler[2] it appeared that the complainant had permitted the conveyance in question to stand for nearly ten years, during which period many valuable improvements had been made by the grantee, and the creditor had also suffered other creditors, junior in date to him, to acquire prior liens, and thus consume the estate of the debtor. Upon this state of facts the court very properly decided that the creditor, having by his supineness allowed the fund to be taken away, could not subsequently be permitted to make his own laches a ground of injury to another. So it has been considered an important element that the transactions out of which the suit arose commenced about thirteen years before any attempt was made toward impeachment, and no efforts at concealment or secrecy were shown.[3] "After such delay," said Chief-Justice Waite, "we are not inclined to set aside what has been permitted to remain so long undisturbed, simply because of an inability to explain with exact certainty from what precise source the money came, which went into the purchase of each particular parcel of property."[4]

Chancellor Kent said:[5] "There is no principle better established in this court, nor one founded on more solid considerations of equity and public utility, than that which declares, that if one man, knowingly, though he does it passively, by looking on, suffers another to purchase and expend money on land, under an erroneous opinion of title, without making known his claim, he shall not afterwards be permitted to exercise his legal right against such person.

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[1] Dominguez v. Dominguez, 7 Cal. 424.

[2] 1 Hill's Ch. (S. C.) 113; s. c. 26 Am. Dec. 192.

[3] Aldridge v. Muirhead, 101 U. S. 401.

[4] Aldridge v. Muirhead, 101 U. S. 402.

[5] Wendell v. Van Rensselaer, 1 Johns. Ch. (N. Y.) 354.

It would be an act of fraud and injustice, and his conscience is bound by this equitable estoppel." The Court of Appeals of New York could "see no reason why the same principle should not protect creditors, who have given credit upon the faith of the apparent ownership of property in possession of the debtor, against a secret unrecorded conveyance, fraudulently concealed by the grantee; as when, with knowledge that the debtor is holding himself out as owner, and is gaining credit upon this ground, he keeps silence, giving no sign."[1] But in this latter case the creditor's suit failed because of his laches in not examining the record, and because of a lack of evidence of knowledge of circumstances which called upon the defendant to record his deed.

§ 288. **Lapse of time.**—The general principle of equity jurisprudence, that lapse of time, independent of limitations or simple laches, may constitute a defense to a suit, is ably considered by McCrary, J., in United States v. Beebee,[2] in an action brought to annul fraudulent patents. The court says in substance, that the authorities support the proposition that lapse of time may be a good defense in equity, independently of any statute of limitations, and they show that the doctrine rests not alone upon laches; it is often put upon one or all of the following grounds, namely: First, that courts of equity must, for the peace of society, and upon grounds of public policy, discourage stale demands by refusing to entertain them; second, that lapse of time will, if long enough, be regarded as evidence against the stale claim, equal to that of credible witnesses, and which, being disregarded, would in a majority of cases lead to unjust judgments; third, that, after the witnesses who had personal knowledge of the facts, have all passed away, it is impossible to ascertain the facts, and courts of equity

[1] Trenton Banking Co. v. Duncan, 86 N. Y. 229.

[2] 17 Fed. Rep. 37.

will, on this ground, refuse to undertake such a task. Thus Mr. Justice Story says: "A defense peculiar to courts of equity is founded upon the mere lapse of time, and the staleness of the claim, in cases where no statute of limitations directly governs the case. In such cases, courts of equity act sometimes by analogy to the law, and sometimes act upon their own inherent doctrine of discouraging, for the peace of society, antiquated demands, by refusing to interfere when there has been gross laches in prosecuting rights, or long and unreasonable acquiescence in the assertion of adverse rights."[1] And in Maxwell v. Kennedy[2] the Supreme Court of the United States, in answer to the argument that there was no statute of limitations applicable to the case at bar, said: "We think the lapse of time, upon the facts stated in the bill and exhibits, is, upon principles of equity, a bar to the relief prayed, without reference to the direct bar of a statute of limitations."

§ 289. — Again, in Clarke v. Boorman's Executors,[3] the same court observed: "Every principle of justice and fair dealing, of the security of rights long recognized, of repose of society, and the intelligent administration of justice, forbids us to enter upon an inquiry into that transaction forty years after it occurred, when all the parties interested have lived and died without complaining of it, upon the suggestion of a construction of the will different from that held by the parties concerned, and acquiesced in by them through all this time." In Brown v. County of Buena Vista[4] the doctrine is expressed in these words: "The lapse of time carries with it the memory and life of witnesses, the muniments of evidence, and other means of proof. The rule which gives it the effect prescribed is necessary to the

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[1] 2 Story's Eq., § 1520.
[2] 8 How. 222.
[3] 18 Wall. 509.
[4] 95 U. S. 161. See Embry v. Palmer, 107 U. S. 11; National Bank v. Carpenter, 101 U. S. 568; Kirby v. Lake Shore & M. S. R.R. Co., 120 U. S. 136; Phillips v. Negley, 117 U. S. 675.

peace, repose, and welfare of society. A departure from it would open an inlet to the evils intended to be excluded." In Harwood v. Railroad Co.[1] the principle is concisely and clearly stated thus: "Without reference to any statute of limitations, the courts have adopted the principle that the delay which will defeat a recovery must depend upon the particular circumstances of each case." Lord Redesdale observed: "It is said that courts of equity are not within the statute of limitations. This is true in one respect; they are not within the words of the statutes, because the words apply to particular legal remedies; but they are within the spirit and meaning of the statutes, and have been always so considered."[2] Important discussions of this general principle may be found in Elmendorf v. Taylor[3] and Badger v. Badger.[4] In Boone v. Chiles[5] the rule is thus laid down: "A court of chancery is said to act on its own rules in regard to stale demands, and independent of the statute. It will refuse to give relief where a party has long slept on his rights, and where the possession of the property claimed has been held in good faith, without disturbance, and has greatly increased in value." In Wilson v. Anthony,[6] cited with approval by the Supreme Court of the United States in Sullivan v. Portland, etc., R.R. Co., the doctrine is well stated thus: "The chancellor refuses to interfere after an unreasonable lapse of time from considerations of public policy, and from the difficulty of doing entire justice when the original transactions have become obscured by time, and the evidence may be lost."[7]

§ 290. **Discovery of the fraud.**—It is a general rule that where the party injured by the fraud remains in ignorance

[1] 17 Wall. 78, 81.
[2] Hovenden v. Lord Annesley, 2 Sch. & Lef. 607.
[3] 10 Wheat. 172.
[4] 2 Wall. 94.
[5] 10 Pet. 248.
[6] 19 Ark. 16.
[7] 94 U. S. 811. And see Hume v. Beale, 17 Wall. 343; Hall v. Law, 102 U. S. 465; Godden v. Kimmell, 99 U. S. 210; Pusey v. Gardner, 21 W. Va. 481.

of it, without any fault or want of care on his part, the statute does not begin to run until the fraud is discovered by, or becomes known to, the party suing, or those in privity with him.[1] "To hold that by concealing a fraud," says Miller, J., "or by committing a fraud in a manner that it concealed itself until such time as the party committing the fraud could plead the statute of limitations to protect it, is to make the law which was designed to prevent fraud the means by which it is made successful and secure."[2] This, as we have already shown, is a rule of pleading,[3] as well as a matter of evidence or of defense.

§ 291. **Judge Blatchford's views.**—This subject was ably discussed in Tyler v. Angevine,[4] by Blatchford, J., while a circuit judge. He said: "In suits in equity, the decided weight of authority is in favor of the proposition, that, where the party injured by the fraud remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered, though there be no special circumstances or efforts, on the part of the party committing the fraud, to conceal it from the knowledge of the other party.[5] On the question as it arises in actions at law, there is, in this country, a very decided conflict of authority. Many of the courts hold that the rule is sustained in courts of equity only on the ground that these courts are not bound by the mere force of the statute, as courts of common law are, but only as they have adopted its principle as expressing their own rule of applying the doctrine of laches in an-

[1] Upton v. McLaughlin, 105 U. S. 640; Bailey v. Glover, 21 Wall. 349; Gifford v. Helms, 98 U. S. 248; Erickson v. Quinn, 47 N. Y. 413; Richardson v. Mounce, 19 S. C. 477.

[2] Bailey v. Glover, 21 Wall. 349, *supra;* Kirby v. Lake Shore & M. S. R.R. Co., 120 U. S. 136.

[3] See §§ 148, 149.

[4] 15 Blatch. 541.

[5] Citing Booth v. Warrington, 4 Bro. P. C. 163; South Sea Co. v. Wymondsell, 3 P. Wms. 143; Hovenden v. Annesley, 2 Sch. & Lef. 634; Stearns v. Page, 7 How. 819; Moore v. Greene, 19 How. 69; Sherwood v. Sutton, 5 Mason 143; Snodgrass v. Branch Bank of Decatur, 25 Ala. 161.

alogous cases. They, therefore, make concealed fraud an exception on purely equitable principles.[1] On the other hand, the English courts, and the courts of Connecticut, Massachusetts, Pennsylvania, and others of great respectability, hold that the doctrine is equally applicable to cases at law.[2] As the case before us is a suit in equity, and as the bill contains a distinct allegation that the defendants kept secret and concealed from the parties interested the fraud which is sought to be redressed, we might rest this case on what we have said is the undisputed doctrine of the courts of equity, but for the peculiar language of the statute we are considering. We cannot say, in regard to this Act of limitations, that courts of equity are not bound by its terms, for its very words are, that no suit *at law or in equity* shall in any case be maintained unless brought within two years, etc. It is quite clear, that this statute must be held to apply equally, by its own force, to courts of equity and to courts of law, and, if there be an exception to the universality of its language, it must be one which applies, under the same state of facts, to suits at law as well as to suits in equity. . . . . And we are also of opinion, that this is founded in a sound and philosophical view of the principles of the statute of limitations. They were enacted to prevent frauds; to prevent parties from asserting rights after the lapse of time had destroyed or impaired the evidence which would show that such rights never existed, or had been satisfied, transferred or extinguished, if they ever did exist. To hold that, by concealing a fraud, or by committing a fraud in a manner that it concealed itself,

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[1] Citing Troup v. Smith, 20 Johns. (N. Y.) 33; Callis v. Waddy, 2 Munf. (Va.) 511; Miles v. Barry, 1 Hill's (S. C.) Law 296; York v. Bright, 4 Humph. (Tenn.) 312.

[2] Citing Bree v. Holbech, Doug. 655; Clark v. Hougham, 3 Dowl. & R. 322; Granger v. George, 5 Barn. & C. 149; First Mass. Turnpike Co. v. Field, 3 Mass. 201; Welles v. Fish, 3 Pick. (Mass.) 75; Jones v. Conoway, 4 Yeates (Pa.) 109; Rush v. Barr, 1 Watts (Pa.) 110; Pennock v. Freeman, 1 Watts (Pa.) 401; Mitchell v. Thompson, 1 McLean 96; Carr v. Hilton, 1 Curtis' C. C. 230.

until such time as the party committing the fraud could plead the statute of limitations to protect it, is to make the law which was designed to prevent fraud, the means by which it is made successful and secure." Mr. Justice Harlan has said:[1] "It is an established rule of equity, as administered in the courts of the United States, that, where relief is asked on the ground of actual fraud, especially if such fraud has been concealed, time will not run in favor of the defendant until the discovery of the fraud, or until, with reasonable diligence, it might have been discovered."

§ 292. **Statute of limitations.**—It follows then, that as to a creditor who seeks to impeach a deed made by his debtor conveying real estate to a third person in fraud of his creditors, the statute of limitations, when applicable, begins to run from the time the fraudulent deed is recorded, or from the time the creditor has actual notice of the conveyance, whichever first occurs.[2] It is familiar learning that in the absence of a contrary rule established by statute, a defendant who desires to avail himself of a statute of limitations as a defense, must raise the question either in pleading, or on the trial, or before judgment.[3] Ten years adverse possession is a good defense in Alabama to a suit to set aside a deed as fraudulent.[4]

§ 293. **Limitations in equity.**—In the consideration of purely equitable rights and titles courts of equity act in analogy to the statute of limitations, but are not bound by it.[5] As was said in the case of Hall v. Russell:[6] "When an action upon a legal title to land would be barred by the statute, courts of equity will apply a like limitation to suits founded upon equitable rights to the same property. So,

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[1] Kirby v. Lake Shore & M. S. R.R. Co., 120 U. S. 136.

[2] Hughes v. Littrell, 75 Mo. 573; Rogers v. Brown, 61 Mo. 187.

[3] Retzer v. Wood, 109 U. S. 187; Storm v. United States, 94 U. S. 81; Upton v. McLoughlin, 105 U. S. 640.

[4] Snedecor v. Watkins, 71 Ala. 48.

[5] Manning v. Hayden, 5 Sawyer 379.

[6] 3 Sawyer, 515.

in cases of implied or constructive trust, where it is sought, for the purpose of maintaining the remedy, to force upon the defendant the character of trustee, courts will apply the same limitation as provided for actions at law."[1]

§ 294. **Insolvency or bankruptcy discharges.**—The insolvent laws of a State have no extra-territorial force. They affect only contracts between citizens of the State in which such laws were enacted.[2] As was tersely stated in Cook v. Moffat,[3] a certificate of discharge will not bar an action brought by a citizen of another State on a contract with him. Such was the conclusion of the Supreme Court of Maine in Felch v. Bugbee,[4] where this question is most carefully examined; and in Baldwin v. Hale,[5] citing that case with approbation, the court decided that a discharge under the insolvent law of one State was not a bar to an action on a note given and payable in the same State, the party to whom the note was given being a resident of a different State, and not having proved his debt against the defendant's estate in insolvency, nor in any manner having been a party to the proceedings.[6] In Pratt v. Chase[7] it is

[1] Citing Elmendorf v. Taylor, 10 Wheat. 176; Miller v. McIntyre, 6 Pet. 66; Beaubien v. Beaubien, 23 How. 207, to which may be added, Wisner v. Barnet, 4 Wash. C. C. 638; Kane v. Bloodgood, 7 Johns. Ch. (N. Y.) 110; Michoud v. Girod, 4 How. 560.

[2] Hills v. Carlton, 74 Me. 156; Rhawn v. Pearce, 110 Ill. 350.

[3] 5 How. 295.

[4] 48 Me. 9.

[5] 1 Wall. 223.

[6] See Guernsey v. Wood, 130 Mass. 503; Bedell v. Scruton, 54 Vt. 493; Watson v. Bourne, 10 Mass. 337; Phelps v. Borland, 30 Hun (N. Y.) 362, 366; S. C. 17 Weekly Dig. (N. Y.) 556; McMillan v. McNeill, 4 Wheat. 209; Hale v. Baldwin, 1 Cliff. 517, affirmed as Baldwin v. Hale, 1 Wall. 223; Boyle v. Zacharie, 6 Pet. 635, 648; Soule v. Chase, 39 N. Y. 342; Ogden v. Saunders, 12 Wheat. 213; Green v. Sarmiento, 1 Pet. C. C. 74; Palmer v. Goodwin, 32 Me. 535; Very v. McHenry, 29 Me. 206; Fiske v. Foster, 10 Met. (Mass.) 597; Chase v. Flagg, 48 Me. 182; Savoye v. Marsh, 10 Met. (Mass.) 594; Bell v. Lamprey, 1 Am. Insolv. Rep. 10; Scribner v. Fisher, 2 Gray (Mass.) 43; Smith v. Smith, 2 Johns. (N. Y.) 235; Gardner v. Oliver Lee's Bank, 11 Barb. (N. Y.) 558; Towne v. Smith, 1 Woodb. & M. 115; Peck v. Hibbard, 26 Vt. 698; Hawley v. Hunt, 27 Iowa 303; Woodbridge v. Allen, 12 Met. (Mass.) 470; Beer v. Hooper, 32 Miss. 246; Anderson v. Wheeler, 25 Conn. 603; Crow v. Coons, 27 Mo. 512.

[7] 44 N. Y. 596.

said that "as to creditors of the insolvent who are not citizens of the same State where the discharge is granted, the want of binding force to defeat the obligation of a contract is founded upon the want of jurisdiction over such creditors."[1] So, a debt contracted and payable in a foreign country is not barred by a discharge under the United States Bankrupt Act, where the creditor was not a party to and had no personal notice of the proceedings in bankruptcy.[2] The discharge of the debtor is not necessarily a bar to the creditor's proceedings to reach property fraudulently alienated. Thus in State v. Williams[3] it appeared that A., having made a fraudulent conveyance of his real estate, was afterward sued by B. During the pendency of the suit, A. filed his petition in bankruptcy, and obtained his discharge before judgment was had against him. Afterward B. filed a bill to set aside the fraudulent conveyance, and to subject the property to the payment of the judgment against A. The court held that the discharge in bankruptcy was no bar to the proceeding. The creditor's proceedings are *quasi in rem*.[4]

§ 295. **Existing and subsequent creditors.**—It is said in

[1] But compare Murray v. Rottenham, 6 Johns. Ch. (N. Y.) 52.

[2] McDougall v. Page, 55 Vt. 187; s. c. 28 Alb. L. J. 372. See McMillan v. McNeill, 4 Wheat. 209; Smith v. Buchanan, 1 East 6; Ellis v. McHenry, L. R. 6 C. P. 228.

[3] 9 Bax. (Tenn.) 64.

[4] A plea of discharge under a foreign insolvency law must set forth the law under which it was procured, and show that it discharged the debt sued upon. Baker v. Palmer, 1 Am. Insolv. Rep. 67. No discharge was granted under the United States Bankrupt Act to corporations. Ansonia B. & C. Co. v. New Lamp Chimney Co., 53 N. Y. 123. To secure the benefit of a discharge in bankruptcy it should be promptly interposed as a defense to any action pending against the bankrupt. Dimock v. Revere Copper Co., 117 U. S. 559, and cases cited; Bradford v. Rice, 102 Mass. 472; Hollister v. Abbott, 31 N. H. 442. As to attacking a discharge, see Poillon v. Lawrence, 77 N. Y. 207, and cases cited. As to claims barred and not barred, see Hennequin v. Clews, 111 U. S. 676; Strang v. Bradner, 114 U. S. 555. It may be here noted that, in New York, an imprisoned debtor is not entitled to a discharge upon making a voluntary assignment under the statute if it is shown that he made a disposition of his property with intent to defraud creditors. Matter of Brady, 69 N. Y. 215; s. c. 1 Am. Insolv. Rep. 102.

Collins v. Nelson[1] that in a suit by a creditor to set aside a conveyance of real estate, alleged to have been executed by his debtor for the fraudulent purpose of cheating, hindering, and delaying the creditor in the collection of the debtor's indebtedness to him, the answer of the debtor, to the effect that, at the time of the commencement of the suit, no part of his indebtedness to the creditor was due and unpaid, will constitute a complete defense in bar of such suit. This statement is, it seems to us, misleading. As is elsewhere shown, subsequent creditors may attack conveyances made with the intention to avoid future liabilities,[2] or to place the risks of new ventures and speculations upon the creditor's shoulders.[3]

§ 296. **Sufficient property left—Gift of land.**—The general rule applicable to conveyances of both real[4] and personal property,[5] as announced by the Supreme Court of Indiana, is, that a sale cannot be impeached as fraudulent unless it is shown that the debtor had no other property subject to execution at the time the conveyance was made. This, it seems, is also a rule of pleading.[6]

Where a father, in solvent circumstances, made an oral gift of land to his son, who entered into possession and made lasting improvements on it, the latter was considered to have a good title as against creditors of the father.[7] "Taking possession under a parol agreement with the consent of the vendor, accompanied with other acts which cannot be recalled so as to place the party taking possession in the same situation that he previously occupied, has always been held to take such agreement out of the operation of the statute" of frauds.[8]

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[1] 81 Ind. 75.

[2] See Chap. VI., §§ 96–101.

[3] See § 100.

[4] Hardy v. Mitchell, 67 Ind. 485; Noble v. Hines, 72 Ind. 12; Spaulding v. Blythe, 73 Ind. 93.

[5] Rose v. Colter, 76 Ind. 592.

[6] See § 140.

[7] Dozier v. Matson, 94 Mo. 328.

[8] Sedg. & Wait on Trial of Title to Land (2d ed.), § 321*a*; Lowry v. Tew, 3 Barb. Ch. (N. Y.) 407; Freeman v. Freeman, 43 N. Y. 34.

§ 297. **What sheriff must show against stranger.**—As a general rule process regular on its face, and issued by a tribunal or officer having authority to issue it, is sufficient to protect the officer, although it may have been irregularly issued. But when an officer attempts to overthrow a sale by the debtor on the ground that it was fraudulent as to creditors, he must go back of his process and show the authority for issuing it. If he acts under an execution he must show a judgment; and if he seizes under an attachment he must show the attachment regularly issued.[1]

[1] Keys v. Grannis, 3 Nev. 550; Thornburgh v. Hand, 7 Cal. 561. See § 81. In Damon v. Bryant, 2 Pick. (Mass.) 413, Chief-Justice Parker said: "Where the goods taken are claimed by a person who was not a party to the suit, and he brings trespass, and his title is contested on the ground of fraud, under the statute 13 Eliz. c. 5, a judgment must be shown, if the officer justifies under an execution, or a debt if under a writ of attachment, because it is only by showing that he acted for a *creditor*, that he can question the title of the vendee. The authorities to this point are Lake v. Billers, 1 Ld. Raym. 733; Bull. N. P. 91, 234; Ackworth v. Kempe, Doug. 41; Savage v. Smith, 2 W. Bl. 1104; Back. Abr. Trespass, G. 1." See, also, Harget v. Blackshear, 1 Taylor (N. C.) 107; High v. Wilson, 2 Johns. (N. Y.) 46; Doe *d.* Bland v. Smith, 2 Stark. 199; Weyand v. Tipton, 5 Serg. & R. (Pa.) 332; Casanova v. Aregno, 3 La. 211.

CHAPTER XX.

HUSBAND AND WIFE—FRAUDULENT MARRIAGE SETTLEMENTS.

§ 298. The marriage relationship.
299. Wife as husband's creditor.
300. Transactions between, how regarded.
301. Burden of proof.
302. Mutuality of fraudulent design.
303. Husband as agent for wife.
304. Wife's separate property.
305. Mingling property of husband and wife.
306. Marriage settlements—Amount of settlement.
§ 307. Post-nuptial settlements.
308. Purchase by wife after marriage.
309. Valid gifts — Subsequent insolvency.
310. Articles of separation.
311. Statute of frauds.
312. Policies of insurance.
313. Competency of wife as witness.
314. Fraudulent conveyances in contemplation of marriage.
315. Fraudulent transfers as affecting dower.

§ 298. **The marriage relationship.**—It would be impracticable to devote separate chapters to the consideration of the different frauds upon creditors incident to each of the various relationships recognized by law; but, as the fairness and good faith of transactions and conveyances between husband and wife are so frequently challenged and assailed by creditors, the rules and decisions governing this branch of our subject must be discussed. As will appear, husband and wife have been made by legislation independent legal personages.[1] A debtor, when threatened with insolvency, naturally reposes confidence in his wife; the relationship inspires this confidence, and it very often results that she becomes wrongfully possessed of "the

[1] See Moore v. Page, 111 U. S. 118; Whiton v. Snyder, 88 N. Y. 304.

creditors' trust fund." The statutes conferring upon married women the power to hold and convey property much the same as though they were single, have unfortunately encouraged husbands to confide to the keeping of their wives property which should have been turned over to creditors. Frauds committed by the husband and wife upon one another, or in contemplation of, or after entering into, the relationship, will also call for incidental discussion as we proceed.

§ 299. **Wife as husband's creditor.**—A wife can become a creditor of her husband, and he may pay an honest debt to her,[1] though as to other creditors the claim may appear stale and ancient. The debtor is not compelled by law to resort to the statute of limitations as a defense, nor can others interfere or insist upon it for him, nor is the wife estopped to receive payment of a debt of this character.[2] The rule as it prevailed at common law was, that a husband could not contract with his wife. Her money not held to her separate use, coming into his possession, was regarded as his property;[3] and his promise to repay such money to her could not be enforced either at law or in equity.[4] This rule, as we have said, has now been almost universally abrogated.[5] In many respects a wife may, under the existing policy of the law, deal with her husband, as regards her

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[1] Patton v. Conn, 114 Pa. St. 183.

[2] Brookville Nat. Bank v. Kimble, 76 Ind. 195.

[3] Joiner v. Franklin, 12 B. J. Lea (Tenn.) 422; Whiton v. Snyder, 88 N. Y. 302.

[4] Atlantic Nat. Bank v. Tavener, 130 Mass. 409; Alexander v. Crittenden, 4 Allen (Mass.) 342; Turner v. Nye, 7 Allen (Mass.) 176; Phillips v. Frye, 14 Allen (Mass.) 36; Degnan v. Farr, 126 (Mass.) 297, 299; Kesner v. Trigg, 98 U. S. 54; Jaffrey v. McGough, 83 Ala. 202.

[5] Towers v. Hagner, 3 Whart. (Pa.) 48; Johnston v. Johnston, 1 Grant (Pa.) 468; Kutz's Appeal, 40 Penn. St. 90; Grabill v. Moyer, 45 Penn. St. 530; Atlantic Nat. Bank v. Tavener, 130 Mass. 409; Babcock v. Eckler, 24 N. Y. 623; Whiton v. Snyder, 88 N. Y. 299; Savage v. O'Neil, 44 N. Y. 298; Steadman v. Wilbur, 7 R. I. 481; *In re* Blandin, 1 Lowell 543; Horton v. Dewey, 53 Wis. 410.

separate estate, upon the same terms as though the relationship had no existence. Thus in a recent case in Massachusetts, in which the opinion was rendered by Chief-Justice Gray, now one of the Justices of the Supreme Court of the United States, it was decided that where a wife loaned to her husband, upon a promise of repayment, money constituting a part of her separate estate, a conveyance of land made by him to her, through a third person, in repayment of such loan, and free from a fraudulent design, would be valid against his creditors.[1]

Manifestly a wife's relinquishment of her dower right is a sufficient consideration for a reasonable settlement upon her out of the husband's property.[2]

§ 300. **Transactions between—How regarded.**—Transactions between husband and wife, to the prejudice of the husband's creditors, are, however, to be scanned closely,[3] and their *bona fides* must be clearly established.[4] Lord Hardwicke said: "I have always a great compassion for wife and children, yet, on the other side, it is possible, if creditors should not have their debts, *their* wives and children may be reduced to want." The court observed in Hoxie v. Price:[5] "On account of the great facilities which the marriage relation affords for the commission of fraud, these transactions between husband and wife should be closely examined and scrutinized, to see that they are fair

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[1] Atlantic Nat. Bank v. Tavener, 130 Mass. 407; followed and approved by the United States Supreme Court in Medsker v. Bonebrake, 108 U. S. 66. See Tomlinson v. Matthews, 98 Ill. 178; Jewett v. Noteware, 30 Hun (N. Y.) 194; French v. Motley, 63 Me. 326; Grabill v. Moyer, 45 Pa. St. 530; Steadman v. Wilbur, 7 R. I. 481; Langford v. Thurlby, 60 Iowa 105.

[2] Hershy v. Latham, 46 Ark. 542.

[3] Hershy v. Latham, 46 Ark. 550; Robinson v. Clark, 76 Me. 494; Frank v. King, 121 Ill. 254.

[4] Booher v. Worrill, 57 Ga. 235. See Thompson v. Feagin, 60 Ga. 82; Hinkle v. Wilson, 53 Md. 292; Seitz v. Mitchell, 94 U. S. 584; Lee v. Cole, 44 N. J. Eq. 328; Webb v. Ingham, 29 W. Va. 389; Curtis v. Wortsman, 25 Fed. Rep. 893; Bayne v. State, 62 Md. 103. See § 308.

[5] 31 Wis. 86. See Fisher v. Shelver, 53 Wis. 501.

and honest, and not mere contrivances resorted to for the purpose of placing the husband's property beyond the reach of his creditors." In all such cases the parties are under temptation to do themselves more than justice.[1] What is secured to the one is apt to be shared by the other. When a creditor challenges such a contract for fraud, slight evidence will change the *onus* and cast on the conjugal pair the duty of manifesting the genuineness and good faith of the transaction by such evidence as will satisfy or ought to satisfy an honest jury.[2] There is, however, no absolute legal presumption that a conveyance of land made by a debtor to his wife is fraudulent as against a creditor of the husband whose judgment was recovered after the conveyance.[3] A wife may be held as trustee *ex maleficio* for the benefit of her husband's creditors.[4]

§ 301. **Burden of proof.**—It is said by Mr. Justice Taylor in the case of Horton v. Dewey,[5] that, "in a contest between the creditors of a husband and the wife, if the wife claims ownership of the property by a purchase, the burden of proof is upon her to prove, by clear and satisfactory evidence, such purchase, and that the purchase was for a valu-

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[1] In Post v. Stiger, 29 N. J. Eq. 556, the court say: "A claim by a wife against a husband, first put in writing when his liabilities begin to jeopardize his future, should always be regarded with watchful suspicion, and, when attempted to be asserted against creditors upon the evidence of the parties alone, uncorroborated by other proof, should be rejected at once, unless their statements are so full and convincing as to make the fairness and justice of the claim manifest." See S. P. Lee v. Cole, 44 N. J. Eq. 328.

[2] It has been said, however, that "such dealings (though to be carefully scrutinized on account of the temptation to give an unfair advantage to the wife over other creditors) must be tested by the same principles as a conveyance by a debtor to a stranger, when brought into question as fraudulent against creditors." Kaufman v. Whitney, 50 Miss. 108. Citing Mangum v. Finucane, 38 Miss. 555; Vertner v. Humphreys, 22 Miss. 130; Roach v. Bennett, 24 Miss. 98; Wiley v. Gray, 36 Miss. 510; Butterfield v. Stanton, 44 Miss. 15. This does not seem to us to harmonize with the best authority relating to the subject.

[3] Hussey v. Castle, 41 Cal. 239; Grant v. Ward, 64 Me. 239. But see § 308.

[4] James Goold Co. v. Maheady, 38 Hun (N. Y.) 296.

[5] 53 Wis. 413.

able consideration, paid by her out of her separate estate, or by some other person for her."[1] And it is further observed, in the course of the opinion, that: "In all such cases the burden of proof showing the *bona fides* of the purchase is upon her, and she must show by clear and satisfactory evidence that the purchase was made in good faith, with her separate estate, or for a consideration moving from some person other than her husband. In all such cases the presumptions are in favor of the creditors, and not in favor of the title of the wife." The mere recital of a valuable consideration in the instrument or bill of sale has been considered insufficient to support a verdict in favor of the wife.[2] Such a recital is regarded as evidence only between the parties and their privies.[3]

It must be remembered that the presumption of possession of the wife's property by the husband, and that he is therefore *prima facie* the owner, has been impaired by modern innovations in the law. Since under the present rule the wife may generally take by gift from her husband[4] as well as from others, and by purchase from any one, her separate and personal possession of specific articles must draw after it the presumption of ownership, and there is no longer any reason for making her case exceptional, or excluding her from the operation of the general rule.[5]

§ 302. **Mutuality of fraudulent design.** — To render an ante-nuptial settlement fraudulent and voidable as to creditors, it is, as we have seen, necessary that both parties

[1] Citing Stanton v. Kirsch, 6 Wis. 338; Horneffer v. Duress, 13 Wis. 603; Weymouth v. Chicago & N. W. Ry. Co., 17 Wis. 550; Duress v. Horneffer, 15 Wis. 195; Beard v. Dedolph, 29 Wis. 136; Stimson v. White, 20 Wis. 563; Elliott v. Bently, 17 Wis. 591; Putnam v. Bicknell, 18 Wis. 333; Hannan v. Oxley, 23 Wis. 519; Fenelon v. Hogoboom, 31 Wis. 172; Hoxie v. Price, 31 Wis. 82; Carpenter v. Tatro, 36 Wis. 297.

[2] See Sillyman v. King, 36 Iowa 207. But compare, *contra*, Stall v. Fulton, 30 N. J. Law 430; Horton v. Dewey, 53 Wis. 410.

[3] Sillyman v. King, 36 Iowa 213; Long v. Dollarhide, 24 Cal. 218; Kimball v. Fenner, 12 N. H. 248. See § 220.

[4] Armitage v. Mace, 96 N. Y. 538.

[5] Whiton v. Snyder, 88 N. Y. 304.

should concur in or have cognizance of the intended fraud.[1] If the settler alone intended a fraud, and the prospective wife had no notice of it, she cannot be affected by it.[2] Marriage, as already shown, is a consideration of the highest value, which, from motives of the soundest policy, is upheld with a steady resolution.[3]

Fraud may be imputed to the parties either by direct co-operation in the original design at the time of its concoction, or by constructive co-operation in carrying the design into execution after notice of it.[4] The question of intent must as in other cases be submitted to the jury.[5]

§ 303. **Husband as agent for wife.**—It is settled beyond controversy that a husband may manage the separate property of his wife without necessarily subjecting it, or the profits arising from his management, to the claims of his creditors.[6] The wife being vested with the right to hold and acquire property free from the control of her husband, the legitimate inference seems to result, that she can employ whomsoever she desires as an agent to manage it.[7] To deny her the right to select her husband for that purpose would constitute a very inequitable limitation upon her right of ownership, compelling her to resort to strangers for advice and assistance, and would perhaps seriously mar the harmony of the marriage relation. In Tresch v. Wirtz[8] the vice-chancellor said: "A man's creditors cannot compel him to work for them. A debtor is not the slave of his creditors. The marital relation does not disqualify a

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[1] See Chap. XIV., §§ 199, 200.

[2] Prewit v. Wilson, 103 U. S. 22; Herring v. Wickham, 29 Gratt. (Va.) 628; Magniac v. Thompson, 7 Pet. 392.

[3] Prewit v. Wilson, 103 U. S. 22. See Chap. XV., §§ 210, 212.

[4] Magniac v. Thompson, 7 Pet. 393, per Story, J.

[5] Monteith v. Bax, 4 Neb. 166; Primrose v. Browning, 59 Ga. 70. See § 254.

[6] Voorhees v. Bonesteel, 16 Wall. 16; Aldridge v. Muirhead, 101 U. S. 399, per Chief-Justice Waite; Tresch v. Wirtz, 34 N. J. Eq. 129; Hyde v. Frey, 28 Fed. Rep. 819.

[7] Hyde v. Frey, 28 Fed. Rep. 823; Woodworth v. Sweet, 51 N. Y. 11.

[8] 34 N. J. Eq. 129. Compare § 26.

husband from becoming the agent of his wife. All the property of a married woman is now her separate estate; she holds it as a *feme sole*, and has a right to embark it in business. She may lawfully engage in any kind of trade or barter. If she engages in business, and actually furnishes the capital, so that the business is in fact and truth hers, she has a right to ask the aid of her husband, and he may give her his labor and skill without rendering her property liable to seizure for his debts."[1] In Merchant v. Bunnell,[2] Davies, Ch. J., said: "This court has frequently held that there is nothing in the marriage relation which forbids the wife to employ her husband as her agent in the management of her estate and property, and that such employment does not subject her property or the profits arising from such business, to the claims of the creditors of her husband."[3]

§ 304. **Wife's separate property.**—It follows from the cases cited, that a creditor cannot subject to the payment of his claim lands belonging to the debtor's wife, the purchase-money of which constituted a part of her separate estate;[4] and where the wife was the owner of a farm upon which she resided, and which the husband carried on in her name, without any agreement as to compensation, it was held that neither the products of the farm, nor property taken in exchange therefor, could be attached by creditors of the husband.[5]

§ 305. **Mingling property of husband and wife.**—If a wife permits her husband to take title to her lands, and to hold himself out to the world as the owner of them, and to con-

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[1] Citing Voorhees v. Bonesteel, 16 Wall. 31. See § 218.

[2] 3 Keyes (N. Y.) 539, 541.

[3] Citing Sherman v. Elder, 24 N. Y. 381; Knapp v. Smith, 27 N. Y. 277; Buckley v. Wells, 33 N. Y. 518; Gage v. Dauchy, 34 N. Y. 293.

[4] Davis v. Fredericks, 104 U. S. 618. Compare Rutherford v. Chapman, 59 Ga. 177.

[5] Gage v. Dauchy, 34 N. Y. 293. See Buckley v. Wells, 33 N. Y. 518; Garrity v. Haynes, 53 Barb. (N. Y.) 599; Bancroft v. Curtis, 108 Mass. 47.

tract debts upon the credit of such ownership, she cannot afterward, by taking title to herself, withdraw them from the reach of his creditors, and thus defeat their claims.[1] At least the courts of New Jersey so hold. And where a husband and wife acquire property by their joint industry and management, the title being taken and held in the husband's name, a conveyance of the property to the wife, without consideration, to the prejudice of existing creditors of the husband, will not it seems be supported.[2]

It is said by the Supreme Court of the United States: "If the money which a married woman might have had secured to her own use is allowed to go into the business of her husband, and be mixed with his property, and is applied to the purchase of real estate for his advantage, or for the purpose of giving him credit in his business, and is thus used for a series of years, there being no specific agreement when the same is purchased that such real estate shall be the property of the wife, the same becomes the property of the husband for the purpose of paying his debts. He cannot retain it until bankruptcy occurs, and then convey it to his wife. Such conveyance is in fraud of the just claims of the creditors of the husband."[3] Humes v. Scruggs is discussed and analyzed by Choate, J., in Van Kleeck v.

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[1] City Nat. Bank v. Hamilton, 34 N. J. Eq. 162. "Having constantly consented he should hold himself out to the world as the owner of this property, and contract debts on the credit of it, up to the very hour of his disaster, it would be against the plainest principles of justice, and utterly subversive of everything like fair dealing, to permit her to step in now and withdraw from the process of the law, put in motion by his creditors, the very property she had permitted him, year after year, to represent to be his, and the apparent ownership of which had given him his business credit and standing." Besson v. Eveland, 26 N. J. Eq. 471. See Sexton v. Wheaton, 8 Wheat. 229.

[2] Langford v. Thurlby, 60 Iowa 107.

[3] Humes v. Scruggs, 94 U. S. 27. Citing Fox v. Moyer, 54 N. Y. 125, 131; Savage v. Murphy, 34 N. Y. 508; Babcock v. Eckler, 24 N. Y. 623; Robinson v. Stewart, 10 N. Y. 190; Carpenter v. Roe, 10 N. Y. 227; Hinde v. Longworth, 11 Wheat. 199; which cases do not all seem to be entirely in point for so broad a proposition. See Wake v. Griffin, 9 Neb. 47; Odell v. Flood, 8 Ben. 543; Besson v. Eveland, 26 N. J. Eq. 468; Moore v. Page, 111 U. S. 119.

Miller,[1] and it was very properly considered that the language was not to be deemed as asserting the doctrine that the wife whose moneys were so received by the husband ceased to be his creditor for the money so retained, or forfeited by the use which she had allowed the husband to make of the money any of her rights as creditor in case of bankruptcy.[2] If the money is received by the husband as his wife's, and to be accounted for or secured by him to her, he waiving his marital rights thereto, she has an equitable right to the fund sufficient to sustain a mortgage subsequently given to secure it, and the mere lapse of time would not invalidate the security.[3]

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[1] 19 N. B. R. 496. This language is employed by Hopkins, J., *In re* Jones, 6 Biss. 68, 73, in deciding a motion to expunge a proof of debt in bankruptcy filed by a wife against a husband: "She allowed him [the husband] to collect, deposit, and use the money when collected as his own, and to enjoy the credit and reputation that the reception and use of the money necessarily gave him; and after parties have dealt with him, supposing and believing he was the owner of such money, she cannot be heard to assert her right to it, and thus defraud honest creditors who have trusted him, relying upon the truth of appearances of ownership which she permitted him to present." See Briggs v. Mitchell, 60 Barb. (N. Y.) 317, where Potter, P. J., said: "A quiet acquiescence that her husband should use her estate as his own, mingling it indiscriminately with his own, in business, for a period of from twelve to nineteen years, without the recognition of its separate existence by even a written receipt, memorandum, or separate investment, and without ever having during that period accounted for interest or principal, or even having talked about it, until the *bona fide* creditors were about to call for it, is a kind of trust or settlement that cannot be recognized by any rule of law or equity, to stand against the rights of antecedent creditors." The arguments advanced in the cases last quoted tend strongly toward the repression of fraudulent transfers of assets by husband to wife. Since the emancipation of married women from the bondage of the common law as regards their right to hold property, they have become the convenient alienees of dishonest husbands who are seeking to elude the just claims of creditors. Nothing is more natural than that courts should rigidly examine, and, in proper cases, overturn transfers of this character. The chief ground usually assigned, that the husband gains a false credit by the apparent ownership and use of the wife's money and property might, it seems to us, be urged against any creditor who sold personal property to the debtor upon credit, reserving title, or any bailor who had entrusted the debtor with the temporary custody of chattels.

[2] See Grabill v. Moyer, 45 Penn. St. 530.

[3] Syracuse Chilled Plow Co. v. Wing, 85 N. Y. 426; Woodworth v. Sweet, 51 N. Y. 9.

§ 306. **Marriage settlements—Amount of settlement.**—If the amount of property settled is extravagant, or grossly out of proportion to the station and circumstances of the husband, this has been regarded as of itself sufficient notice of fraud.[1] In an able opinion, in the case of Davidson v. Graves,[2] Justice Nott says: "There is no case that I have seen, where a man has been permitted to make an intended wife a mere stock to graft his property upon, in order to place it above the reach of his creditors. A marriage settlement must be construed like every other instrument. The question may always be raised, whether it was made with good faith, or intended as an instrument of fraud."[3] The usual test is that the settlement must be reasonable considering the grantor's circumstances.[4] If it complies with this requirement it will be upheld. When a person possesses a large estate, and, owing debts inconsiderable in amount, makes a voluntary settlement of a part of his property upon a wife and child, retaining enough of his property himself to pay his existing debts many times over, it would not be a fair or reasonable inference that such a transaction was intended to hinder or defraud persons to whom he happened to owe trifling debts.[5] A settlement upon a wife of all a man's property exempt from execution, cannot, of course, be upheld, unless the marriage was not only the sole consideration for it, but the agreement was entered into by the wife in ignorance of her husband's indebtedness, and without knowledge of circumstances sufficient to put her upon inquiry.[6] In Colombine v. Penhall,[7] a celebrated English case, the court said: "Where there is evidence of an intent to defeat and delay creditors, and to make the

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[1] *Ex parte* McBurnie, 1 De G., M. & G. 441; Croft v. Arthur, 3 Dessaus. (S. C.) 223.

[2] Riley's Eq. (S. C.) 236; Colombine v. Penhall, 1 Sm. & G. 228; Bulmer v. Hunter, L. R. 8 Eq. Cas. 46.

[3] See Phipps v. Sedgwick, 95 U.S. 3.

[4] Crawford v. Logan, 97 Ill. 399.

[5] Dygert v. Remerschnider, 32 N. Y. 637.

[6] Gordon v. Worthley, 48 Iowa 431.

[7] 1 Sm. & G. 256.

celebration of a marriage a part of a scheme to protect property against the rights of creditors, the consideration of marriage cannot support such a settlement."[1]

§ 307. **Post-nuptial settlements.**—The court decided in French v. Holmes,[2] that a voluntary gift by a husband to his wife, if he was indebted at the time, was *prima facie* fraudulent as to creditors. Davis, J., states the rule to be that a voluntary post-nuptial settlement will be upheld "if it be reasonable, not disproportionate to the husband's means, taking into view his debts and situation, and clear of any intent, actual or constructive, to defraud creditors."[3] Mr. Justice Field observes: "A husband may settle a portion of his property upon his wife, if he does not thereby impair the claims of existing creditors, and the settlement is not intended as a cover to future schemes for fraud."[4] A settlement consummated after marriage, in pursuance of an agreement entered into before marriage, will be upheld against creditors,[5] and a voluntary conveyance for the benefit of a wife and children will not be overturned at the suit of a mortgage creditor who by reason of his own laches has lost his ample security.[6]

§ 308. **Purchase after marriage.**—Purchases of either real or personal property made by the wife of an insolvent debtor during coverture are justly regarded with suspicion, unless it clearly appears that the consideration was paid out of her separate estate.[7] The community of interest between

[1] See Bulmer v. Hunter, L. R. 8 Eq. Cas. 46.

[2] 67 Me. 189.

[3] Kehr v. Smith, 20 Wall. 35; Cook v. Holbrook, 146 Mass. 66. See Wiswell v. Jarvis, 9 Fed. Rep. 87.

[4] Moore v. Page, 111 U. S. 118. See Jones v. Clifton, 101 U. S. 225.

[5] Kinnard v. Daniel, 13 B. Mon. (Ky.) 499.

[6] Stephenson v. Donahue, 40 Ohio St. 184.

[7] Seitz v. Mitchell, 94 U. S. 582; Hinkle v. Wilson, 53 Md. 287; Simms v. Morse, 4 Hughes 579; Knowlton v. Mish, 8 Sawyer 627. In Hoey v. Pierron, 67 Wis. 262, 269, the court said: "As to whether the debtor made and executed that mortgage to his wife with the intent to hinder, delay, or defraud his creditors, the court charged the jury that the burden of proof was upon the defendant to show by clear and satisfactory evidence that it was

husband and wife requires that purchases of this character which are so often made a cover for a debtor's assets, and so frequently resorted to for the purpose of withdrawing his property from the reach of his creditors and preserving it for his own use, should be closely scrutinized, and in a contest between the creditors of the husband and those of the wife, there is, and should be, a presumption against her which she must overcome by affirmative proof. This was the rule of the common law, and it continues, though statutes have modified the doctrine which gave the husband title to the wife's personalty.[1]

§ 309. **Valid gifts—Subsequent insolvency.**—It is said in a recent case in Texas that a gift from the husband to the wife is not necessarily fraudulent and void as to existing creditors. It might be a badge of fraud, a circumstance to be considered in determining whether the intent was fraudulent, if it were shown that he was then heavily in debt. But it does not follow that, because a man may be indebted to an inconsiderable or even a considerable

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made by him with such intent. This is assigned as error. Undoubtedly the burden of proving that the mortgage to the wife was given to secure an actual indebtedness to her from her husband for moneys or property advanced by her from her separate estate, or by some other person for her use, was upon the wife; but when that was proved and, in effect, admitted, it shifted such burden to the defendant. Semmens v. Walters, 55 Wis. 683, 684; Evans v. Rugee, 57 Wis. 624. Assuming that the defendant made a case within the provisions of sec. 2319, R. S., which, in such case, declares that 'the burden shall be upon the plaintiff to show that such mortgage was given in good faith, and to secure an actual indebtedness and the amount thereof,' yet it has often been held, in effect, by this court that the establishment of such 'actual indebtedness and the amount thereof,' satisfies the requirements of the section and shifts the burden of proof to such defendant." See § 300.

[1] Seitz v. Mitchell, 94 U. S. 582, 583; Gamber v. Gamber, 18 Pa. St. 366; Keeney v. Good, 21 Pa. St. 349; Walker v. Reamy, 36 Pa. St. 410; Parvin v. Capewell, 45 Pa. St. 89; Robinson v. Wallace, 39 Pa. St. 129; Aurand v. Schaffer, 43 Pa. St. 363; Bradford's Appeal, 29 Pa. St. 513; Glann v. Younglove, 27 Barb. (N. Y.) 480; Edwards v. Entwisle, 2 Mackey (D. C.) 43; Ryder v. Hulse, 24 N. Y. 372; Duncan v. Roselle, 15 Iowa 501; Cramer v. Reford, 17 N. J. Eq. 367; Elliott v. Bently, 17 Wis. 591. See Edson v. Hayden, 20 Wis. 682.

amount at the time, he cannot settle a part of his property upon his wife or children, provided, as we have seen, he retains an ample amount of property to liquidate his just debts.[1] Nor will the settlement be affected because it may turn out afterward, from accident or ill-fortune, that his property has perished or been swept away.[2] The general rule then is that a conveyance by a husband, solvent at the time, to his wife and children, will be supported[3] if he retains ample means to pay his debts,[4] and the gift or conveyance is a reasonable one.[5]

§ 310. **Articles of separation.**—Where a husband and wife executed articles of separation by which the husband bound himself to pay, in trust for his wife, a certain amount of capital, and interest on it till paid, it becomes a voluntary settlement if the parties become reconciled and again cohabit, even though there be an agreement that the settlement shall stand.[6] A settlement has been avoided upon this theory, where it appeared that the amount of the husband's estate was $16,132, while the settlement was $7,000, leaving $9,132, to meet debts confessedly due amounting to $9,306.

§ 311. **Statute of frauds.**—In New York every agreement or undertaking made upon consideration of marriage, unless reduced to writing, and subscribed by the parties, is void,[7] and a settlement made subsequently, in pursuance of such void agreement, is invalid as against creditors.[8]

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[1] Van Bibber v. Mathis, 52 Tex. 407; Morrison v. Clark, 55 Tex. 444. See Emerson v. Bemis, 69 Ill. 537; Hinde's Lessee v. Longworth, 11 Wheat. 199.

[2] Ibid.; Cooper, Chancellor, in Perkins v. Perkins, 1 Tenn. Ch. 543.

[3] Brown v. Spivey, 53 Ga. 155.

[4] Chambers v. Sallie, 29 Ark. 407; Kent v. Riley, L. R. 14 Eq. Cas. 190.

[5] When a partner uses firm funds to purchase property to settle upon his wife, creditors of the copartnership may pursue the property in equity. Edwards v. Entwisle, 2 Mackey (D. C.) 43; Emerson v. Bemis, 69 Ill. 537; Mattingly v. Nye, 8 Wall. 370; Kesner v. Trigg, 98 U. S. 54.

[6] Kehr v. Smith, 20 Wall. 31.

[7] Dygert v. Remerschnider, 32 N. Y. 629.

[8] Reade v. Livingston, 3 Johns. Ch. (N. Y.) 481; Borst v. Corey, 16 Barb. (N. Y.) 136, and cases cited.

§ 312. **Insurance policies.**—As we have shown, in New York, policies of insurance may be placed upon a husband's life for the benefit of his wife, free from the claims of creditors.[1] But where assignments of policies, taken out by a debtor who was insolvent, are made in trust for the benefit of his wife, such transfers may be annulled in favor of creditors.[2] The court, however, say in the case last cited, that they "do not mean to extend it to policies effected without fraud directly and on their face for the benefit of the wife, and payable to her; such policies are not fraudulent as to creditors."[3] In cases where a debtor at his own expense effects insurance on his life as security to a creditor, the representative of the debtor gets title to the surplus after the debt is paid. And if the debtor in his lifetime pays the debt, he is entitled to have the policy delivered up to him.[4] As already shown, a man may devote a portion of his earnings to insurance for the benefit of his family.[5]

§ 313. **Competency of wife as witness.**—On a creditor's bill to set aside a conveyance of land by a husband to his wife, she is regarded in Illinois as a competent witness to prove the consideration of the conveyance and its good faith.[6] It seems, however, to be doubted whether a wife can be com-

[1] See § 23. Ætna Nat. Bank v. United States Life Ins. Co., 24 Fed. Rep. 770; Charter Oak Life Ins. Co. v. Brant, 47 Mo. 419.

[2] Appeal of Elliott's Exrs., 50 Pa. St. 75.

[3] See Thompson v. Cundiff, 11 Bush. (Ky.) 567. Compare Nippes' Appeal, 75 Pa. St. 478; Gould v. Emerson, 99 Mass. 154; Durian v. Central Verein, 7 Daly (N. Y.) 171; Leonard v. Clinton, 26 Hun (N. Y.) 290; Estate of Henry Trough, 8 Phila. (Pa.) 214.

[4] *Re* Newland, 7 N. B. R. 477. See Lea v. Hinton, 5 De G., M. & G. 823; Drysdale v. Piggott, 22 Beav. 238; Courtenay v. Wright, 2 Giff. 337; Morland v. Isaac, 20 Beav. 389. As to who should sue to reach the proceeds of a policy where the debtor has made a general assignment, see Lowery v. Clinton, 32 Hun (N. Y.) 267.

[5] Washington Central Bank v. Hume, 128 U. S. 195.

[6] Payne v. Miller, 103 Ill. 443. The testimony of a husband in favor of his wife, on a bill to subject land in her name to the payment of his debts, when not impeached, must be regarded the same as that of any other witness having a personal interest or feeling as to the matters about which he testifies. Eads v. Thompson, 109 Ill. 87.

pelled to testify against her husband when he is a co-defendant with her, if the husband objects to her examination.[1] While the act of Congress[2] cut up by the roots all objections in Federal courts to the competency of a witness on account of interest, it is considered that the statute has no application to a wife, as her testimony is excluded solely upon considerations of public policy and not of interest.[3]

§ 314. **Fraudulent conveyances in contemplation of marriage.**—Alienations of real property by a man about to be married, made without the knowledge of his intended bride, and with the intent and object of depriving her of the rights which she would otherwise acquire in his property by the marriage, may, as we have already seen,[4] be avoided by the wife as fraudulent.[5] In Smith v. Smith[6] the chancellor said: "I am of opinion that a voluntary conveyance by a man, on the eve of marriage, unknown to the intended wife, and made for the purpose of defeating the interest which she would acquire in his estate by the marriage, is fraudulent as against her." The doctrine is not limited to covinous conveyances of realty, but where personal property is disposed of by a colorable transfer, the husband retaining a secret interest, and the ultimate object being to deprive the wife of her share of it, the conveyance may be avoided.[7] The rule is also applied and enforced where the conveyance is made by the husband during coverture with a like intent and purpose. Thus in

[1] Clark v. Krause, 2 Mackey (D. C.) 572.

[2] U. S. Rev. Stat., § 858.

[3] See Lucas v. Brooks, 18 Wall. 453.

[4] See § 70.

[5] DeArmond v. DeArmond, 10 Ind. 191; Pomeroy v. Pomeroy, 54 How. Pr. (N. Y.) 228; Swaine v. Perine, 5 Johns. Ch. (N. Y.) 482; Youngs v. Carter, 1 Abb. N. C. (N. Y.) 136 n., affi'd 10 Hun (N. Y.) 194; Smith v. Smith, 6 N. J. Eq. 515; Simar v. Canaday, 53 N. Y. 298; Petty v. Petty, 4 B. Mon. (Ky.) 215; Thayer v. Thayer, 14 Vt. 107; Brown v. Bronson, 35 Mich. 415; Smith v. Smith, 12 Cal. 217; Kelly v. McGrath, 70 Ala. 75. See § 70.

[6] 6 N. J. Eq. 522.

[7] See Littleton v. Littleton, 1 Dev. & B. (N. C.) Law 327; Davis v. Davis, 5 Mo. 183; Stone v. Stone, 18 Mo. 389; Tucker v. Tucker, 29 Mo. 359; McGee v. McGee, Ired. Law (N. C.) 105.

Gilson v. Hutchinson[1] it appeared that a mortgagor procured a sale of the mortgaged estate under a power contained in the mortgage, with a view to evade liabilities to his wife, from whom he had been separated, and to deprive her of her right of dower. The court held that she could maintain a bill in equity for the recovery of the property, both as administratrix and in her own right.[2] The rule has been said to embrace conveyances made by the intended wife as well as by the husband.[3] Brickell, C. J., said: "We confess an inability to distinguish the ante-nuptial frauds of the husband from the ante-nuptial frauds of the wife, or to perceive any sound reason for repudiating and avoiding the one, while permitting the other to work out its injustice and injury."[4]

§ 315. **Fraudulent transfers as affecting dower.**—It seems to be quite clearly established[5] that where a deed made by a husband and wife is set aside as a fraud upon creditors, the judgment will not operate to bar the wife's right of dower. The creditors cannot claim *under* the conveyance

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[1] 120 Mass. 27. See Killinger v. Reidenhauer, 6 S. & R. (Pa.) 531; Brewer v. Connell, 11 Humph. (Tenn.) 500; Jenny v. Jenny, 24 Vt. 324; Jiggitts v. Jiggits, 40 Miss. 718.

[2] In Littleton v. Littleton, 1 Dev. & B. Law (N. C.) 331, Chief-Justice Ruffin observed: "But *bona fide* conveyances, that is to say, such as are not intended to defeat the wife, do not seem to be within the meaning more than within the words of the act. Such are sales, to make which an unfettered power is allowed the husband. Such, too, appear to be *bona fide* gifts, whereby the husband actually and openly divests himself of the property and enjoyment in his lifetime, in favor of children or others, thereby making, according to his circumstances and the situation of his family, a just and reasonable present provision for persons having meritorious claims on him, and with that view, and not with the view to defeat nor for the sake of diminishing the wife's dower." Compare McIntosh v. Ladd, 1 Humph. (Tenn.) 459; Miller v. Wilson, 15 Ohio 108; Stewart v. Stewart, 5 Conn. 317; Kelly v. McGrath, 70 Ala. 75.

[3] Kelly v. McGrath, 70 Ala. 75.

[4] See Butler v. Butler, 21 Kans. 522; Spencer v. Spencer, 3 Jones' Eq. (N. C.) 404; Terry v. Hopkins, 1 Hill's Ch. (S. C.) 1; Williams v. Carle, 10 N. J. Eq. 543; Freeman v. Hartman, 45 Ill. 57; Belt v. Ferguson, 3 Grant (Pa.) 289; Duncan's Appeal, 43 Pa. St. 67; Fletcher v. Ashley, 6 Gratt. (Va.) 332.

[5] See "Effect of Fraudulent Conveyances upon the Right of Dower." 5 Cent. L. J. 459, and cases cited.

and *against* it, or ask to have it annulled as to creditors and held valid as against the wife.[1] The theory of the law is that the wife cannot release her dower in her husband's real estate, except by joining with him in a conveyance;[2] a release to a stranger to the title is ineffectual,[3] and as the husband's deed is declared void at the creditor's instigation, the wife's release falls with it.[4]

Dower is not barred by an assignment under the Bankrupt Act.[5]

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[1] Robinson v. Bates, 3 Metc. (Mass.) 40; Summers v. Babb, 13 Ill. 483; Dugan v. Massey, 6 Bush (Ky.) 81; Cox v. Wilder, 2 Dillon 47; Woodworth v. Paige, 5 Ohio St. 70; Richardson v. Wyman, 62 Me. 280; Morton v. Noble, 4 Chic. L. N. 157; Malony v. Horan, 12 Abb. Pr. (N. Y.) N. S. 289; s. c. 49 N. Y. 111; Lowry v. Smith, 9 Hun (N. Y.) 515.

[2] Tompkins v. Fonda, 4 Paige (N. Y.) 448; Merchants' Bank v. Thomson, 55 N. Y. 12.

[3] Harriman v. Gray, 49 Me. 537.

[4] Munger v. Perkins, 62 Wis. 499.

[5] Porter v. Lazear, 109 U. S. 84.

CHAPTER XXI.

FRAUDULENT GENERAL ASSIGNMENTS.

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§ 316. **Voluntary assignments.**—To discuss the general phases of the law regulating voluntary assignments made by debtors for the benefit of creditors would require a volume,[1] and is foreign to our purposes. When, however, as

[1] See Burrill on Assignments, 5th ed., by George L. Sterling, Esq. Baker, Voorhis & Co., New York. See, especially, Chapter XXV. of that work. See §§ 114, 115 of the present treatise for the rules as to complainants. As to election to accept benefits which will estop creditors from attacking an assignment, see Wilson Bros. W. & T. Co. v. Daggett. 9 Civ. Pro. (N. Y.) 408, and cases cited by McAdam, C. J.; also Ryhiner v. Ruegger, 19 Bradw. (Ill.) 162. In Wright v. Zeigler, 70 Ga. 512, the court said: "So a creditor cannot be permitted both to assail and claim under an as-

is frequently the case, these assignments are mere contrivances called into being to hinder, delay, or defraud creditors, and, from their surroundings, or upon their face, contravene the provisions of the statute 13 Eliz. c. 5, creditors may attack and annul them. The principles of the law regulating this branch of the subject are legitimately within the line of our discussion, and they will, upon investigation, be found to constitute a prolific source of legal controversy. It seems remarkable that the instrument under which an insolvent surrenders up his depleted estate to his creditors should so frequently be itself tainted with the poison of fraud.

It may be observed at the outset that to constitute a general assignment there must be an element of trust,[1] and the conveyance must be voluntary.[2] The property in possession of the assignee is not *in custodia legis*,[3] for the rea-

signment; one or the other of these alternatives he must take. His election should be made before he commences proceedings, and he should not be permitted to await the result of his suit in order to make his election. This would be unfair to others claiming under the assignment." Compare Haydock v. Coope, 53 N. Y. 68. As to when a bill of particulars will not be ordered in a suit to annul an assignment, see Passavant v. Cantor, 21 Abb. N. C. (N. Y.) 259. See § 162*a*.

[1] Hine v. Bowe, 46 Hun (N. Y.) 196; Brown v. Guthrie, 110 N. Y. 435.

[2] Lewis v. Miller, 23 Weekly Dig. (N. Y.) 495. In Brown v. Guthrie, 110 N. Y. 441, Finch, J., said: "The view of the case which prevailed with the General Term was, that the mortgage, and the agreement which led to it, taken together, amounted to a general assignment by an insolvent debtor, which was void because it reserved to him a possible surplus at the expense of unpaid creditors, and the right to make preferences subsequent to the conveyance. If the basis of the reasoning be sound, the result reached was a proper inference; but we are not satisfied that the mortgage and agreement amounted to a general assignment by the debtor. In form it was an absolute sale upon a chattel mortgage given for a fixed and agreed consideration; and while, nevertheless, such a sale, in spite of its form, may be proved to be an assignment in trust (Britton v. Lorenz, 45 N. Y. 51), yet in the present case we are unable to discover any such proof. The material and essential characteristics of a general assignment is the presence of a trust. The assignee is merely trustee and not absolute owner. He buys nothing and pays nothing, but takes the title for the performance of trust duties. There was no such element in the transaction between these parties. The purchaser became absolute owner and paid or secured the full amount of his mortgage."

[3] See Lehman v. Rosengarten, 23 Fed. Rep. 642.

son that the assignee is not an officer of the court, but is a trustee bound to account according to the terms of the instrument, and his authority depends upon the validity of the assignment, and is not conferred by the court.[1]

The assignee derives all his power from the assignment, which is both the guide and measure of his duty. Beyond that or outside of its terms he is powerless and without authority. The control of the court over his actions is limited in the same way, and can only be exercised to compel his performance of the stipulated and defined trust, and protect the rights which flow from it. He distributes the proceeds of the estate placed in his care according to the dictation and under the sole guidance of the assignment, and the statutory provisions merely regulate and guard his exercise of an authority derived from the will of the assignor. The courts, therefore, cannot direct him to pay a debt of the assignor, or give it preference in violation of the terms of the assignment and the rights of other creditors under it. To hold the contrary would be to put the court in the place of the assignor, and assert a right to modify the terms of the assignment, after it had taken effect, against the will of its maker, and to the injury of those protected by it. The assignee is merely the representative of the debtor and must be governed by the express terms of his trust.[2] The parties cannot change the terms of the instrument, or withdraw the property from the jurisdiction of the court, or absolve the assignee from its control. Nor can the assignor substitute a successor if the assignee resigns. The new appointment must be made by the court.[3]

§ 316*a*. **Property transferred by assignment.**—The discussion has already embraced the authorities declaring what assets creditors may reach by bill or other proceeding.[4] As

[1] Adler v. Ecker, 1 McCrary 257.

[2] Finch, J., in Matter of Lewis, 81 N. Y. 424. See Nicholson v. Leavitt, 6 N. Y. 519.

[3] Chapin v. Thompson, 89 N. Y. 280.

[4] See Chap. II.

creditors are frequently forced to accept upon their claims whatever the assignee is able to realize from the property, it is important to know what estate is acquired by such a transfer. Every interest to which the personal representatives of a deceased person could succeed may pass by a properly framed assignment.[1] The assignee may acquire title to a claim for conversion;[2] may gain a right to recover in replevin,[3] and to sue a common carrier for the loss of goods.[4] He takes moneys deposited in bank[5] and lands[6] which belonged to the assignor. In Warner v. Jaffray[7] the court said: "The assignment was a mere voluntary conveyance, and can have no greater effect, so far as passing title to the property assigned, than any other conveyance." In New York State by statute the assignee is clothed with power to assail fraudulent alienations of property.[8] Rights of action for personal torts which die with the person are not assignable;[9] as for instance damages for an assault and battery;[10] so the title to trust property does not pass;[11] nor does property in transit;[12] nor a wife's dower right;[13] nor exempt property.[14]

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[1] See Zabriskie v. Smith, 13 N. Y. 322, 335. See Bishop on Insol. Debtors, § 143.

[2] Whittaker v. Merrill, 30 Barb. (N. Y.) 389; Richtmeyer v. Remsen, 38 N. Y. 206; Sherman v. Elder, 24 N. Y. 381; McKee v. Judd, 12 N. Y. 622.

[3] Jackson v. Losee, 4 Sandf. Ch. (N. Y.) 381.

[4] Merrill v. Grinnell, 30 N. Y. 594; McKee v. Judd, 12 N. Y. 622.

[5] Beckwith v. Union Bank, 9 N. Y. 211.

[6] Matter of Marsh, 3 Cow. (N.Y.) 69.

[7] 96 N. Y. 254.

[8] Southard v. Benner, 72 N. Y. 424; Spring v. Short, 90 N. Y. 538; Ball v. Slaften, 98 N. Y. 622; Fort Stanwix Bank v. Leggett, 51 N. Y. 552; Matter of Raymond, 27 Hun (N. Y.) 508; Matter of Cornell, 110 N. Y. 360. The assignee cannot divest himself or be divested of his right to sue for assets so long as the trust continues. Stanford v. Lockwood, 95 N. Y. 582.

[9] People v. Tioga Common Pleas, 19 Wend. (N. Y.) 73; Brooks v. Hanford, 15 Abb. Pr. (N. Y.) 342; Hodgman v. Western R.R. Co., 7 How. Pr. (N. Y.) 492.

[10] See Pulver v. Harris, 52 N. Y. 73; Bishop on Insol. Debtors, § 143.

[11] Kip v. Bank of New York, 10 Johns. (N. Y.) 63.

[12] Lacker v. Rhoades, 51 N. Y. 641.

[13] Dimon v. Delmonico, 35 Barb. (N. Y.) 554.

[14] Heckman v. Messinger, 49 Pa. St. 465; Baldwin v. Peet, 22 Tex. 708; Smith v. Mitchell, 12 Mich. 180.

The assignment, it may be here recalled, takes effect from the time of its delivery.[1]

§ 317. **Word "void" construed.**—The distinction between void and voidable acts will be defined and discussed at length presently.[2] It will be shown that the term "void" is constantly interpreted to mean nothing more than "voidable," and that this construction is especially true as applied to voluntary assignments.[3] Though the statute in characterizing assignments constantly uses the term "void as to creditors," it is obvious that "nothing more is intended than inoperative or voidable";[4] or, as was observed by Chief-Justice Shaw, "such conveyance is not absolutely void, but voidable only by creditors."[5] It is the distinguishing characteristic of a void act[6] that it is incapable of ratification, but an assignment which is fraudulent upon its face is capable of confirmation by creditors,[7] and is good between the parties, hence it is not logically speaking void.

§ 318. **Delay and hindrance.**—Mr. Burrill says:[8] "The term *delay* has an obvious reference to time, and *hindrance* to the interposition of obstacles in the way of a creditor; but, to a certain extent, the one involves and includes the other. In point of fact, and as actually applied by the courts, they are always taken together. The following are prominent instances in which assignments have been declared void on the ground of hindrance and delay: Where the time of sale,[9] or of collection by the assignee,[10] or of finally closing

[1] Nicoll v. Spowers, 105 N. Y. 1; Warner v. Jaffray, 96 N. Y. 248.

[2] See *infra*, Void and Voidable Acts.

[3] See Burrill on Assignments, 5th ed., § 319, p. 502.

[4] Per Redfield, Ch. J., in Merrill v. Englesby, 28 Vt. 155. See § 445.

[5] Edwards v. Mitchell, 1 Gray (Mass.) 241.

[6] See *infra*, Void and Voidable Acts.

[7] See White v. Banks, 21 Ala. 713. Compare Hone v. Henriquez, 13 Wend. (N. Y.) 242; Geisse v. Beall, 3 Wis. 367.

[8] Burrill on Assignments, 5th ed., 1887, § 335, p. 527.

[9] Citing Hafner v. Irwin, 1 Ired. (N. C.) Law 490.

[10] Citing Storm v. Davenport, 1 Sandf. Ch. (N. Y.) 135.

the trust,[1] has been, by the terms of the assignment, unreasonably or indefinitely postponed; where the assignee has been expressly authorized to sell at retail, and on credit,[2] or on credit simply;[3] where the assignment has been made with a view to prevent a sacrifice of the property;[4] where the proceeds of the assigned property have been directed to be used in defending all suits which might be brought by creditors to recover their debts;[5] and where creditors who should sue have been expressly debarred from the benefit of the assignment,[6] or postponed until all the other creditors are paid.[7] All these were instances of *delaying* and *hindering* creditors in the prosecution of their remedies in the strict sense of the terms used in the statute." In the famous Sprague litigation, it is said that a debtor has no right to postpone or put in peril the claims of his creditors without their consent, and that a conveyance which attempts so to do, or which is executed for the purpose of depriving creditors of their right to enforce their just claims against the property of their debtor, by placing it beyond their reach or control for an unlimited, indefinite, or uncertain period, is in conscience, as well as in law, fraudulent.[8]

§ 319. **Intent affecting assignments.**—"It is clear, however," says Mr. Burrill, "from the language of the English statute of 13 Elizabeth, that its provisions were directed exclusively against conveyances made with an *actual intent*, on the part of debtors, to hinder, delay, or defraud creditors,

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[1] Citing Arthur v. Commercial & R.R. Bank, 17 Miss. 394.

[2] Citing Meacham v. Sternes, 9 Paige (N. Y.) 398, 406.

[3] Citing Barney v. Griffin, 2 N.Y. 365; Nicholson v. Leavitt, 6 N. Y. 510.

[4] Citing Van Nest v. Yoe, 1 Sandf. Ch. (N. Y.) 4; Vernon v. Morton, 8 Dana (Ky.) 247. But see Cason v. Murray, 15 Mo. 378.

[5] Citing Planck v. Schermerhorn, 3 Barb. Ch. (N. Y.) 644; Mead v. Phillips, 1 Sandf. Ch. (N. Y.) 83.

[6] Citing Spence v. Bagwell, 6 Gratt. (Va.) 444; Berry v. Riley, 2 Barb. (N. Y.) 307.

[7] Citing Marsh v. Bennett, 5 McLean 117.

[8] De Wolf v. Sprague Mfg. Co., 49 Conn. 325.

as distinguished from the mere *effect* or *operation* of such conveyances. The expressions in the preamble—'*devised* and *contrived*,' 'to the end, *purpose*, and *intent* to delay,' etc., leave no room for doubt on this point. Hence, it has sometimes been very expressively designated as the 'statute against fraudulent *intents* in alienation.'"[1] It will be presently shown that the learned writer has stated the rule too broadly, for a fraudulent intent is often imputed by the law in cases where the assignor's motives were undoubtedly honest.[2] Generally speaking the subject of inquiry in these cases is the intent of the assignor or debtor,[3] though there is authority tending to establish the rule that the fraudulent purpose sufficient to defeat the instrument must be partici-

[1] Burrill on Assignments, 5th ed., § 332, p. 524.

[2] See §§ 8, 9, 19, 322.

[3] Wilson v. Forsyth, 24 Barb. (N. Y.) 120; Mathews v. Poultney, 33 Barb. (N. Y.) 127; Griffin v. Marquardt, 17 N. Y. 28; Cuyler v. McCartney, 40 N. Y. 221; Bennett v. Ellison, 23 Minn. 242; S. C. 1 Am. Insol. Rep. 36; Peck v. Crouse, 46 Barb. (N. Y.) 157; Putnam v. Hubbell, 42 N. Y. 106; Ruhl v. Phillips, 48 N. Y. 125; Lesher v. Getman, 28 Minn. 93; Jaeger v. Kelley, 52 N. Y. 274; Dudley v. Danforth, 61 N. Y. 626; Main v. Lynch, 54 Md. 658; Bennett v. Ellison, 23 Minn. 242; Forbes v. Waller, 25 N. Y. 439. "An assignee for the benefit of creditors stands in the place of the assignor, and is so affected with his intent, that if it is unlawful the instrument cannot stand." Tabor v. Van Tassell, 86 N. Y. 643. See § 316. In Adler v. Ecker, 1 McCrary 256, the court remark that the only intent which will determine the validity of an assignment is that of the assignor, at the time it is made, and contemporaneous fraudulent acts are evidence of this intent. It is then observed of the case under consideration, that it is in proof that one E. being insolvent, and owing debts amounting to more than double the value of his assets, took from his business, within four weeks before his assignment, a sum equal to one-half of the value of the property assigned, and with it erected a building upon a lot owned by his wife. Within a short time thereafter he joined with his wife in giving a mortgage upon this property to his father-in-law, for three times the amount of any debt owing either by him or his wife, and this mortgage and accompanying notes were sent to the father-in-law, without any request on his part, or any information on the subject, until the papers were received. The court comment upon the fact that there is no evidence to counteract or explain why the mortgage was given for so large a sum, after one-fourth of the debtor's entire assets had been taken from his business in the manner stated, and under circumstances calculated to show an intent to put a portion of his available means beyond the reach of his creditors, and arrive at the conclusion that the assignment was fraudulent and void.

pated in by the assignee or beneficiaries.[1] The testimony of both the assignor and assignee upon the question of intent is proper.[2] Recognizing the general rule, elsewhere discussed, that a voluntary conveyance or gift may be annulled at the instigation of creditors, without proof of an absolute fraudulent intent on the part of the donee,[3] it would seem to follow by analogy that the cases which hold that proof of the fraudulent intent of the debtor or assignor is sufficient, establish the more logical and salutary rule. In a case which arose in New York it was expressly decided that an assignment by a debtor, with the intent to hinder or defraud creditors, may be avoided although the assignees were free from all imputation of participation in the fraudulent design, and were themselves *bona fide* creditors of the assignor.[4] In Loos v. Wilkinson,[5] Earl, J., said: "An innocent assignee may not be permitted to act under a fraudulent assignment. . . . . It may be true that in a particular case an honest assignee may . . . . undo all the fraudulent acts of the assignor preceding and attending the assignment and the preparation of the schedules under it. Yet, if the assignment was made by the assignor with the fraudulent intent condemned by the statute, the assignment may be set aside at the suit of judgment-creditors, and all powers of the assignee, however honest he may be, taken away. In assailing a voluntary assignment for the benefit

[1] See Thomas v. Talmadge, 16 Ohio St. 433; Governor v. Campbell, 17 Ala. 566; Byrne v. Becker, 42 Mo. 264; Abercrombie v. Bradford, 16 Ala. 560; State v. Keeler, 49 Mo. 548; Wise v. Wimer, 23 Mo. 237; Mandel v. Peay, 20 Ark. 329.

[2] Forbes v. Waller, 25 N. Y. 439. See § 205.

[3] See § 200.

[4] Rathbun v. Platner, 18 Barb. (N. Y.) 272. "An assignee in trust for the benefit of creditors is not 'a purchaser for a valuable consideration,' however innocent he may be of participation in the fraud intended by the assignor. The uprightness of his intentions, therefore, will not uphold the instrument, if it would otherwise, for any reason, be adjudged fraudulent and void." Griffin v. Marquardt, 17 N. Y. 30. See Loos v. Wilkinson, 110 N. Y. 195; Starin v. Kelly, 88 N. Y. 418, and compare Sipe v. Earman, 26 Gratt.(Va.) 570.

[5] 110 N. Y. 209.

of creditors, it is important only to establish the fraudulent intent of the assignor,[1] and when that has been established the assignment may be set aside, and creditors may then pursue their remedies and procure satisfaction of their judgments as if the assignment had not been made."

§ 320. **Fraud must relate to instrument itself.**—Where it is sought to annul a fraudulent transfer, the evidence must ascertain and establish the assignor's intent at the time of the execution of the instrument.[2] If the assignment was valid in its creation, having been honestly and properly executed and delivered, no subsequent illegal acts, either of omission or commission, can in any manner invalidate it.[3] The subsequent acts should, however, be considered, as they "may reflect light back upon the original intent," and help to characterize and discern it more correctly.[4] It may be observed that neither conveyances without consideration, nor other frauds committed by a failing debtor prior to a general assignment for the benefit of his creditors, will operate to make it void as matter of law. These are circumstances which may be taken into consideration by a court and jury, if nearly contemporaneous, but are not conclusive of a fraudulent intent.[5] To render the assignment invalid, when good on its face, the fact of a fraudulent intent in making it must be legitimately found from evidence that will fairly support the finding, and it must also be an intent to commit a fraud on creditors by making the assignment, and not by some *entirely independent act* which might and probably would have been done precisely as it was, had no assignment been made or contemplated.[6]

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[1] Citing Starin v. Kelly, 88 N. Y. 418.

[2] Shultz v. Hoagland, 85 N. Y. 467; Mathews v. Poultney, 33 Barb. (N. Y.) 127; Beck v. Parker, 65 Pa. St. 262; Bailey v. Mills, 27 Tex. 434–438; Cornish v. Dews, 18 Ark. 172; Klapp v. Shirk, 13 Pa. St. 589; Owen v. Arvis, 26 N. J. Law 22.

[3] Hardmann v. Bowen, 39 N. Y. 200.

[4] Shultz v. Hoagland, 85 N. Y. 468.

[5] Livermore v. Northrup, 44 N. Y. 111; Probst v. Welden, 46 Ark. 408.

[6] Wilson v. Forsyth, 24 Barb. (N. Y.)

Proof of an intentional omission from the schedules of assigned property, of items of valuable property, is sufficient to establish a fraudulent intent. Referring to this subject, Finch, J., said: "The intentional omission, calculated to deceive, and to lull into slumber and inactivity the interest and diligence of the creditor, would plainly argue a fraudulent purpose. Not so, however, if shown to have been unintentional, and the result of accident or oversight. It would be hard to find any schedules absolutely perfect, or any debtor who could inventory every item of his property with strict accuracy. Room must be allowed for honest mistake, and possibly even for careless and thoughtless error; but, where the omission cannot thus be explained or excused, the inference of a fraudulent intent must follow." [1] The motive to prevent creditors from gaining a preference will of course not avoid the assignment.[2] It may be here remarked that if an assignment is made in the form and manner provided by law, and duly recorded so as to pass all the property of the assignor, it is difficult to see how the motive existing in the assignor's mind can affect its validity. If in morals the motive be a bad one, yet in law it produces no forbidden result. In so far as it hinders or delays creditors it is a lawful hindrance and delay, and cannot be held fraudulent. The commission of a lawful act is not made unlawful by the fact that it proceeded from a malicious motive.[3]

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128. In Aaronson v. Deutsch, 24 Fed. Rep. 466, the court said: "The rule which the defendant seeks to invoke, that a deed valid in its inception will not be rendered invalid by any subsequent fraudulent or illegal act of the parties, has no application where the fraudulent or illegal act is the consummation of an illegal agreement made contemporaneously with the deed."

[1] Shultz v. Hoagland, 85 N. Y. 469. See Baird v. Mayor, etc., of N. Y., 96 N. Y. 593.

[2] See § 341. Horwitz v. Ellinger, 31 Md. 504.

[3] Wilson v. Berg, 88 Pa. St. 172; S. C. 1 Am. Insolv. Rep. 169; Jenkins v. Fowler, 24 Pa. St. 308; Fowler v. Jenkins, 28 Pa. St. 176; Glendon Iron Co. v. Uhler, 75 Pa. St. 467; Smith v. Johnson, 76 Pa. St. 191.

§ 321. **Good faith.**—The term "good faith," if interpreted to mean "sincerity or honesty of purpose," can scarcely be applied in that sense to assignments, for these instruments are often annulled from considerations of public policy in cases where nothing was more foreign to the intention of the debtor than a dishonest design. The usual presumption of good faith incident to acts and transactions generally,[1] appertains to an assignment, and it will be upheld where the language of the instrument justifies a construction which will support it.[2]

§ 322. **Void on its face.**—An assignment for the benefit of creditors may undoubtedly contain a clause so plainly indicative of the fraudulent intent pointed out by the statute, or recognized by the policy of the law, "as to carry its death-wound upon its face." An instance of this might be a gratuitous provision out of the assigned property for the insolvent assignor or his family.[3] The New York cases clearly establish the rule that where the assignment shows upon its face that it must necessarily have the effect of hindering and defrauding the creditors of the assignor, it is conclusive evidence of a fraudulent intent, and may be avoided.[4] The actual motive and belief of the debtor in such cases is immaterial. Where it is apparent from the face of the instrument itself that it is a conveyance to the use of the assignor, it is the duty of the court trying the

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[1] See §§ 5, 6, 224, 271.

[2] Townsend v. Stearns, 32 N. Y. 209, 218; Brainerd v. Dunning, 30 N. Y. 211; Campbell v. Woodworth, 24 N. Y. 304; Shultz v. Hoagland, 85 N. Y. 464; Coyne v. Weaver, 84 N. Y. 386, and cases cited.

[3] Nightingale v. Harris, 6 R. I. 329. Danforth, J., said, in McConnell v. Sherwood, 84 N. Y. 526: "Where, upon the face of an assignment or by proof *aliunde*, it appears to have been made with intent to hinder or delay creditors, it affords no protection to the assignee against a sheriff, who seeks to enforce by execution a judgment against the debtor."

[4] Kavanagh v. Beckwith, 44 Barb. (N. Y.) 192; Goodrich v. Downs, 6 Hill (N. Y.) 438. See Wakeman v. Dalley, 44 Barb. (N. Y.) 503, affi'd 51 N. Y. 27; Griffin v. Marquardt, 21 N. Y. 121; Coleman v. Burr, 93 N. Y. 31; S. P. Bigelow v. Stringer, 40 Mo. 205, and cases cited.

cause to tell the jury as a matter of law that the conveyance is fraudulent as against creditors.[1] In the case of Dunham v. Waterman,[2] Mr. Justice Selden, referring to the opinion of the Court of Errors in Cunningham v. Freeborn,[3] remarked: "It follows from the reasoning of Mr. Justice Nelson, which I regard as unanswerable, that wherever an assignment contains provisions which are calculated *per se* to hinder, delay, or defraud creditors, although the fraud must be passed upon as a question of fact, it nevertheless becomes the duty of the court to set aside the finding, if in opposition to the plain inference to be drawn from the face of the instrument. A party must in all cases be held to have intended that which is the necessary consequence of his acts."[4]

§ 323. **Constructive frauds defined by Story.**—"By constructive frauds," observes Mr. Justice Story, "are meant such acts or contracts as, although not originating in any actual evil design or contrivance to perpetrate a positive fraud or injury upon other persons, are yet, by their *tendency* to deceive or mislead other persons, or to violate private or public confidence, or to impair or injure the public interests, deemed equally reprehensible with positive fraud, and therefore are prohibited by law, as within the same reason and mischief as acts and contracts done *malo animo*."[5] Again the commentator says: "Another class of constructive frauds upon the rights, interests, or duties of third persons, embraces all those agreements and other acts of parties, which *operate* directly or virtually to *delay*, *defraud*, or deceive creditors. Of course we do not here speak of cases of express and intentional fraud upon creditors, but of such as virtually and indirectly operates the

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[1] Bigelow v. Stringer, 40 Mo. 205.
[2] 17 N. Y. 9, 21.
[3] 11 Wend. (N. Y.) 240–251.
[4] See opinion of Ingraham, J., in Wakeman v. Dalley, 44 Barb. (N. Y.) 503; Gere v. Murray, 6 Minn. 305. See §§ 9, 10.
[5] 1 Story's Eq. Jur. § 258.

same mischief, by abusing their confidence, misleading their judgment, or secretly undermining their interest. It is difficult, in many cases of this sort, to separate the ingredients which belong to positive and intentional fraud, from those of a mere constructive nature, which the law pronounces fraudulent upon principles of public policy. Indeed, they are often found mixed up in the same transaction."[1]

§ 324. **Assignments contravening statutes.**—We may state as a general rule that an assignment which contravenes the provisions of a statute, or vests the assignee with a discretion contrary to the terms of an express provision of law, and authorizes him to effect sales of the assigned property in a manner not permitted by the statute, will be declared void.[2] This principle is learnedly discussed in a case recently decided in the Supreme Court of the United States.[3] The assignment provided as follows: "The party of the second part [the assignee] shall take possession of all and singular the property and effects hereby assigned, and sell and dispose of the same, either at public or private sale, to such person or persons, for such prices and on such terms and conditions, either for cash or upon credit, as in his judgment may appear best and most for the interest of the parties concerned, and convert the same into money." It will be observed that the assignment did not by its terms prevent the assignee in the administration of his trust from following the directions of the statute in all particulars. Counsel contended that the assignment was valid (1) because the discretion given the assignee by the assignment left him at liberty to follow the law, and (2) because even if the assignment required him to administer the trust in a

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[1] 1 Story's Eq. Jur. § 349.

[2] Jaffray v. McGehee, 107 U. S. 361–365; Collier v. Davis, 47 Ark. 369. See Peck v. Burr, 10 N. Y. 294; Macgregor v. Dover & Deal R.R. Co., 18 Q. B. 618; Jackson v. Davison, 4 Barn. & Ald. 691; Miller v. Post, 1 Allen (Mass.) 434; Parton v. Hervey, 1 Gray (Mass.) 119; Hathaway v. Moran, 44 Me. 67.

[3] Jaffray v. McGehee, 107 U. S. 361.

manner different from that prescribed by the law, only such directions as conflicted with the law would be void, and the assignment itself would remain valid. The Supreme Court of the United States, however, did not adopt this view, but followed the construction given to the assignment law of Arkansas by the Supreme Court of that State in Raleigh v. Griffith,[1] to the effect that such an assignment was void as to creditors, and held that the construction put upon the law by the highest court of the State where the assignment was made, was binding on the courts of the United States.[2] The substance of the opinion in Raleigh v. Griffith,[3] is that the statute is disregarded in the deed of assignment, the assignee being authorized to sell at private or public sale, and for cash or on credit. The assignee was vested with a discretion to prolong the closing of the trust for an indefinite period. The legislature having deemed it expedient, as a matter of public policy, to require an assignee for the benefit of creditors to sell the property within a specified time and prescribed manner, the dissenting creditors are not barred by a deed made in direct contravention of a plain provision of the statute. The provisions of the statute are mandatory and not directory,[4] and it follows, in the words of Mr. Justice Woods, that an assignment "which vests the assignee with a discretion contrary to the mandates of the statute, and in effect authorizes him to sell the property conveyed thereby in a method not permitted by the statute, must be void, for contracts and conveyances in contravention of the terms or policy of a statute will not be sanctioned."[5]

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[1] 37 Ark. 153.

[2] Brashear v. West, 7 Pet. 608; Sumner v. Hicks, 2 Black 532; Leffingwell v. Warren, 2 Black 599. See § 71.

[3] 37 Ark. 153.

[4] See French v. Edwards, 13 Wall. 506.

[5] Jaffray v. McGehee, 107 U. S. 365. Citing Peck v. Burr, 10 N. Y. 294; Macgregor v. Dover & Deal R.R. Co., 18 Q. B. 618; Jackson v. Davison, 4 Barn. & Ald. 695; Miller v. Post, 1 Allen (Mass.) 434; Parton v. Hervey, 1 Gray (Mass.) 119; Hathaway v. Moran, 44 Me. 67.

§ 325. **Transfer to prevent sacrifice of property.**—In German Insurance Bank v. Nunes[1] the material part of the deed read: "That whereas, the said first party is indebted to sundry persons in various sums, amounting in the aggregate to about thirty-eight thousand dollars, and is the owner of a large amount of assets, estimated to be worth more than fifty thousand dollars; and whereas, the said first party is unable to convert his said assets into money fast enough to discharge his said indebtedness as it matures, and is desirous that the same shall not be sacrificed, but so managed and disposed of that they will realize their fair value at as little cost as possible, and satisfy his creditors in full, and leave a residue for him, etc." The court said that it was the intention which controlled, and that this could not be better determined than from the language of the conveyance. The deed declared that it was made "to prevent a sacrifice" of the property and "to leave a residue" to the debtor. It also avowed that the assets were largely in excess of the liabilities, and it would seem to follow that the primary object of the deed was not to secure creditors, but on the contrary to obstruct them in the enforcement of their legal remedies in order that the debtor might be benefited. The deed was declared to be fraudulent upon its face and was set aside.[2]

§ 326. **Reservations—Exempt property.**—A favorite ground of attacking assignments made by debtors for the benefit of creditors is, that a reservation has been made in the debtor's interest,[3] or that there has not been a complete surrender of the debtor's dominion and control over the property. The question comes up in various phases. Davis, P. J., observes: "It is well settled that the reservation

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[1] 80 Ky. 334, 335.

[2] See, also, Vernon v. Morton, 8 Dana (Ky.) 247, 264; Van Nest v. Yoe, 1 Sandf. Ch. (N. Y.) 4; Ward v. Trotter, 3 Mon. (Ky.) 1; Bigelow v. Stringer, 40 Mo. 195.

[3] Means v. Dowd, 128 U. S. 273; McReynolds v. Dedman, 47 Ark. 351.

of the least pecuniary character by the assignor or his family, and any device to cover up the property for the benefit of the assignor, or secure to him directly or indirectly any benefit, is fraudulent, and has always received the condemnation of the courts. The debtor who makes an assignment of this character must devote all his property to the payment of his debts, except such as is by law exempt from execution. The withholding of any considerable sum of money at the time of making an assignment, from the assignee, must, we think, in some form be explained, otherwise it is sufficient to establish a fraudulent intent."[1] An assignment is void which does not include the assignor's real estate.[2] A reservation of $800 worth of property[3] renders an assignment void on its face. And an assignment is invalid if the debtor prefers his landlord's claim for rent of a dwelling-house with intent to secure occupation for himself and family subsequent to the assignment without further payment.[4]

We have already shown that according to the weight of the best authority, a conveyance of a debtor's exempt property cannot be annulled as fraudulent. The same principle appertains in the law regulating fraudulent voluntary assignments reserving property exempt by statute. The assignment is not rendered void, for the reason that creditors are "not hindered or delayed by the reservation of that which they have no right to touch."[5] This is an exception to the rule clearly deducible from the cases, "that no debtor can, in an assignment, make a reservation at the expense

[1] White v. Fagan, 25 N. Y. Daily Reg., p. 269 (Feb. 8, 1884). See s. c. 18 Weekly Dig. (N. Y.) 358.

[2] Price v. Haynes, 37 Mich. 487, per Cooley, C. J.; s. c. 1 Am. Insolv. Rep. 138.

[3] Clark v. Robbins, 8 Kans. 574.

[4] Elias v. Farley, 2 Abb. Ct. App. Dec. (N. Y.) 11.

[5] Hildebrand v. Bowman, 100 Pa. St. 582. See Mulford v. Shirk, 26 Pa. St. 474; Ehrisman v. Roberts, 68 Pa. St. 311. To the same effect is Richardson v. Marqueze, 59 Miss. 80; s. c. 42 Am. Rep. 353; See Derby v. Weyrich, 8 Neb. 176; s. c. 30 Am. Rep. 827. See §§ 46–50.

of his creditors of any part of his income or property for his own benefit, nor can he stipulate for any advantage either to himself or family."[1] Another reservation must be considered.

§ 327. **Reserving surplus.**—Where a debtor assigned all his property in trust to pay certain specified creditors, and then, without making provision for other creditors, to reconvey the residue of the property to the debtor, the instrument was declared fraudulent upon its face. The court held that it could not be made effectual by showing that there was, as matter of fact, no surplus resulting to the debtor after the preferred creditors were paid. Bronson, J., observed: "The parties contemplated a surplus, and provided for it; and they are not now at liberty to say that this was a mere form which meant nothing. And although it should ultimately turn out that there is no surplus, still the illegal purpose which destroys the deed is plainly written on the face of the instrument, and there is no way of getting rid of it."[2] The Supreme Court of Nebraska,[3] however, refused to follow this doctrine, and considered that such a reservation was partial and only incidental. It merely stipulated for that which, had it been omitted, the law would have implied, and required to be done.[4] So in Hubler v. Waterman[5] the court observed: "The reversionary clause is mere surplusage, for it would have been implied if it had not been expressed."[6] The principle set forth in these latter cases certainly embodies the more logical rule. There is, however, an obvious distinction in these cases. In Griffin v. Barney the surplus was to revert before *all* the creditors were paid, which was

[1] McClurg v. Lecky, 3 P. & W. (Pa.) 91.

[2] Griffin v. Barney, 2 N. Y. 371. See Smith v. Howard, 20 How. Pr. (N. Y.) 128. Compare Nicholson v. Leavitt, 6 N. Y. 521.

[3] Morgan v. Bogue, 7 Neb. 433.

[4] See Curtis v. Leavitt, 15 N. Y. 9.

[5] 33 Pa. St. 414.

[6] See S. P. Johnson v. McAllister, 30 Mo. 327; Richards v. Levin, 16 Mo. 598.

palpably fraudulent, while in the other cases the surplus contemplated was that remaining after *all* the creditors had been satisfied. Of course the law will not permit a debtor in failing circumstances to convey all his property to trustees, with a view to exempt it from execution for an indefinite time, to authorize them to hold it against creditors until the profits pay all charges, expenses, and debts, and then to reconvey it or permit it to revert to the original owner. Property cannot be thus withdrawn from the operation of the law in its due course against the consent of existing creditors.[1]

§ 328. **Releases exacted in assignments.**—Assignments exacting releases from creditors are looked upon with great disfavor by the courts.[2] The law seems to be settled that assignments will be declared fraudulent and void if creditors are preferred *on condition* of their subsequently executing releases of their respective demands. The reason is obvious.[3] It is a clear attempt on the part of the debtor to coerce his creditors to accede to his terms, and a withholding of his property from them unless they do so accede. As was observed in Hyslop v. Clarke:[4] "It does not actually give a preference, but is, in effect, an attempt on the part of the debtors to place their property out of the reach of their creditors, and to retain the power to give such preference at some future period. . . . . If they can keep it locked up in this way in the hands of the trustees, and set their creditors at defiance, for three months, they may do so for three years, or for any indefinite period."[5] The

[1] Arthur v. Commercial & R.R. Bank, 17 Miss. 433.

[2] Hubbard v. McNaughton, 43 Mich. 224. See Lawrence v. Norton, 4 Woods 406; Leitch v. Hollister, 4 N. Y. 211; Baldwin v. Peet, 22 Tex. 708; Barney v. Griffin, 2 N. Y. 365; Bennett v. Ellison, 23 Minn. 242; S. C. 1 Am. Insolv. Rep. 36.

[3] Spaulding v. Strang, 38 N. Y. 12; Brown v. Knox, 6 Mo. 303; Bennett v. Ellison, 23 Minn. 242; S. C. 1 Am. Insolv. Rep. 36; May v. Walker, 35 Minn. 194; Greeley v. Dixon, 21 Fla. 425.

[4] 14 Johns. (N. Y.) 458.

[5] See Grover v. Wakeman, 11 Wend. (N. Y.) 187.

right of giving preferences cannot be so exercised as to secure to the debtor the future control of the assigned property or its proceeds, as continuing the business in another's name.[1]

It has been considered competent for a debtor in failing circumstances to make an assignment for the benefit of creditors, providing that accommodation creditors shall be paid first; secondly, those creditors who had executed a conditional release should receive fifty per cent.; and thirdly, the residue of the creditors should be paid.[2] The whole estate was by this instrument devoted to the payment of the debts. It was considered that in no sense could it be said that an agreement by a debtor with a creditor to prefer him for one-half of his demand in an assignment, on condition or in consideration that the balance should be released, was a fraud upon those who refused to become parties to the contract. These cases certainly go to the verge in upholding an assignment of this character;[3] and where it is apparent from the face of the deed, or is a moral certainty, that nothing will be left to the non-assenting creditors, the court will annul the assignment.[4]

§ 329. **Preferring claims in which assignor is partner—Rights of survivor.**—It was contended by counsel in Welsh v. Britton,[5] that if an insolvent person made an assignment for creditors, and preferred a debt due another firm, one member of which was also a member of the assigning firm, this constituted such a reservation to one of the assignors as would avoid the assignment. The case of Kayser v. Heavenrich[6] was cited, but the court said that it could not be said to establish so broad a principle. There a prefer-

[1] Haydock v. Coope, 53 N. Y. 68.

[2] Spaulding v. Strang, 37 N. Y. 135; s. c. 38 N. Y. 9; explained, Haydock v. Coope, 53 N. Y. 74.

[3] Seale v. Vaiden, 4 Woods 661.

[4] Seale v. Vaiden, 4 Woods 661. See Lawrence v. Norton, 4 Woods 406.

[5] 55 Tex. 122.

[6] 5 Kan. 324.

ence was given to one Lowentholl, and one of the assigning firm was an equal partner with Lowentholl in the preferred claim. This was held to be a secret trust for the benefit of that member of the firm and to invalidate the assignment. The fact of secrecy was also given prominence. On the other hand, the case of Fanshawe v. Lane[1] asserts the absolute right of an assigning firm to prefer such debts. The Supreme Court of Texas followed this latter case. We may here state that the insolvent cannot delegate to the assignee the power to give preferences at his discretion.[2]

A special partner cannot be preferred for the amount of his investment,[3] and where a limited partnership becomes insolvent its assets are a special fund for the payment of its debts except those due to the special partner.[4] A surviving partner may make a general assignment of the firm assets.[5] Mr. Justice Harlan said: "But, while the surviving partner is under a legal obligation to account to the personal representative of a deceased partner, the latter has no such lien upon joint assets as would prevent the former from disposing of them for the purpose of closing up the partnership affairs. He has a standing in court only through the equitable right which his intestate had, as between himself and the surviving partner, to have the joint property applied in good faith for the liquidation of the joint liabilities. As with the concurrence of all of the partners the joint property could have been sold or assigned, for the benefit of preferred creditors of the firm, the surviving partner—there being no statute forbidding it—could make the same disposition of it. The right to do so grows out

[1] 16 Abb. Pr. (N. Y.) 82.

[2] Boardman v. Halliday, 10 Paige (N. Y.) 223.

[3] Whitcomb v. Fowle, 10 Daly (N. Y.) 23; S. C. 1 Am. Insolv. Rep. 160.

[4] Innes v. Lansing, 7 Paige (N. Y.) 583.

[5] Emerson v. Senter, 118 U. S. 3; Williams v. Whedon, 109 N. Y. 341; Haynes v. Brooks, 42 Hun (N. Y.) 528; Beste v. Burger, 17 Abb. N. C. (N. Y.) 162, and note on the rights of surviving partners, and representatives of a deceased partner.

of his duty, from his relations to the property, to administer the affairs of the firm so as to close up its business without unreasonable delay; and his authority to make such a preference—the local law not forbidding it—cannot, upon principle, be less than that which an individual debtor has in the case of his own creditors. It necessarily results that the giving of preference to certain partnership creditors was not an unauthorized exertion of power by Moores, the surviving partner."[1]

§ 330. **Authorizing trustee to continue business.**—It may be observed that an assignment drawn precisely as it ought to be will not undertake to speak to the assignee in regard to his duties under the trust. These duties, unless the creditors themselves direct otherwise, are simply to convert the estate and pay the debts in the order and with the preferences indicated in the instrument.[2] There are numerous cases reported in which assignments in trust for the benefit of creditors have been sustained, although they contained provisions for the continuance of the business of the assignor, either by himself or by his trustee.[3] It will be found upon examination that in many of these cases, the business authorized to be carried on by the assignment was merely ancillary to winding up the debtor's affairs, and that the authority was given with the view of more effectually promoting the interests of the creditors.[4] In cases where

[1] Emerson v. Senter, 118 U. S. 3, 8.

[2] Ogden v. Peters, 21 N. Y. 24. "The true principle applicable to all such cases is, that a debtor who makes a voluntary assignment for the benefit of his creditors may direct, in general terms, a sale of the property and collection of the dues assigned, and may also direct upon what debts and in what order the proceeds shall be applied; but beyond this can prescribe no conditions whatever as to the management or disposition of the assigned property." Selden, J., in Dunham v. Waterman, 17 N. Y. 20.

[3] De Forest v. Bacon, 2 Conn. 633; Kendall v. The New England Carpet Co., 13 Conn. 383; Foster v. Saco Manuf. Co., 12 Pick. (Mass.) 451; Woodward v. Marshall, 22 Pick. (Mass.) 468; Hitchcock v. Cadmus, 2 Barb. (N. Y.) 381; Ravisies v. Alston, 5 Ala. 297; Janes v. Whitbread, 11 C. B. 406.

[4] See De Wolf v. Sprague Mfg. Co., 49 Conn. 326.

the authority is given chiefly for the benefit of the debtor, or where it is intended or calculated to hinder and delay creditors for an unreasonable period in the collection of their debts, it renders the deed fraudulent and void.

§ 331. **Illustrations and authorities.**—Cases relating to this class of assignments are numerous. In Owen v. Body[1] the assignment, which was to trustees for the benefit of creditors, giving preferences, contained provisions investing the trustees with power to carry on the trade of the debtor, and for that purpose to lay out money in payment of rent and keeping up the stock in trade. The deed was adjudged void as being an instrument to which creditors could not reasonably be expected to assent. Lord Wensleydale, in giving his opinion in the House of Lords in the case of Wheatcroft v. Hickman,[2] referring to this deed said that the provisions contained in it allowing the effects of the debtor, which ought to have been divided equally amongst his creditors, to be put in peril by being employed in trade, prevented it from being a fair deed and good against creditors. In American Exchange Bank v. Inloes[3] the deed contained a provision empowering the trustee at his discretion to sell the property conveyed gradually, in the manner and on the terms in which, in the course of their business, the assignors had sold and disposed of their merchandise. For that reason the deed was adjudged void. Mason, J., said: "Without adverting to other objectionable, if not fatal, provisions in this deed, the one to which we have just referred is sufficient, in the judgment of this court, to render the deed null and void as against creditors. It simply seeks, through the instrumentality of a trustee, to provide for carrying on the business of the concern in the same manner in which it had been before conducted, and for an indefinite period, free of all control or interfer-

[1] 5 Adol. & El. 28 (31 Eng. C. L. 254).

[2] 9 C. B. [N. S.] 101.

[3] 7 Md. 380.

ence on the part of creditors. Surely if such a provision in a deed is not calculated to hinder and delay creditors, we are at a loss to know what could have such an effect, short of a conveyance in trust for the benefit of the grantor himself. A debtor cannot thus postpone his creditors to an indefinite period without their assent. A conveyance which thus attempts to deprive creditors of their just rights to enforce their claims against the property of their debtor, by placing it beyond their control for an uncertain and indefinite period, must be regarded in conscience and law as a fraud." In a later case in the same State[1] an assignment in trust for the benefit of creditors, authorizing the trustee to carry on and conduct the business "for such time as in his judgment it shall be beneficial to so do," or to sell all the goods and stock in trade "at such times, in such manner, and for such prices as he may deem proper," was adjudged void as against creditors. The court said: "It is obvious, the certain effect of this clause would be to hinder and delay creditors; and as against them such provision renders the deed utterly void. It is an attempt on the part of the debtor to place his property, for an uncertain and indefinite period, beyond the reach of his creditors, and to make their rights in a great measure dependent upon the uncontrolled discretion of a trustee of the debtor's own selection. The law will tolerate no such attempt, but treats the act as a fraud upon creditors, and the instrument of conveyance as simply void as against them."[2]

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[1] Jones v. Syer, 52 Md. 211.

[2] See, also, Dunham v. Waterman, 17 N. Y. 9. Authority given in the assignment to the assignee to finish up unfinished work will not necessarily avoid the instrument. Robbins v. Butcher, 104 N. Y. 575. In this case the assignment contained the following clause: "And it is further provided that should it be necessary and to the better performance of the trust that the party of the second part shall have full power and authority to finish such work as is unfinished, to complete such buildings as are incompleted, and to pay all necessary charges and expenses for such completion prior to the payment of all debts and liabilities hereinbefore mentioned and provided." Finch, J., said: "The repetition of the word

§ 332. Delay—Sales upon credit.—An insolvent debtor cannot deprive his creditors of their right to have his property converted into money without delay. He can make an assignment with preferences, but he cannot authorize his assignee to sell on credit.[1] No delay is permitted other than such as is reasonably necessary to secure the application of the property to the payment of his debts.[2] In Dunham v. Waterman,[3] Selden, J., following the reasoning of Nelson, J., in Cunningham v. Freeborn,[4] said: "That wherever an assignment contains provisions which are calculated *per se* to hinder, delay, or defraud creditors, although the fraud must be passed upon as a question of fact, it nevertheless becomes the duty of the court to set aside the finding, if in opposition to the plain inference to be drawn from the face of the instrument. A party must in all cases be held to have intended that which is the necessary consequence of his acts."[5] It follows that when this objectionable feature is embodied in the face of the assignment, the court itself will stamp it as fraudulent. In Beus

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'that' permits it to be said that this provision is an unfinished sentence and confers no authority at all, but no such criticism is made, and the meaning of the language is more accurately expressed by disregarding the word 'that' where it occurs the second time. Both parties have argued the case upon such construction. The appellant claims that the provision confers upon the assignee an authority derived from the assignor to unduly delay the execution of the trust and divert the trust funds, in the exercise of his discretion, and free from the supervision and control of the courts, and so is fraudulent and void upon its face. The respondent contends that the authority given is upon a condition which rests in the discretion and judgment of the courts, and if exercised by the assignee without their prior permission and approval, must be so exercised at his peril and subject to their prohibition or direction at any moment, and upon the application of any person interested or aggrieved, and so does not involve an intent to hinder, delay, or defraud the creditors of the assignor. We think the latter view of the instrument discloses its true and intended meaning."

[1] Nicholson v. Leavitt, 6 N. Y. 510; Barney v. Griffin, 2 N. Y. 365. Compare Brackett v. Harvey, 91 N. Y. 220.

[2] Bennett v. Ellison, 23 Minn. 242; s. c. 1 Am. Insolv. Rep. 36. See Keevil v. Donaldson, 20 Kans. 165; s. c. 1 Am. Insolv. Rep. 153.

[3] 17 N. Y. 21.

[4] 11 Wend. (N. Y.) 251–254.

[5] See Coleman v. Burr, 93 N. Y. 31; also §§ 9, 10.

v. Shaughnessy[1] the insolvent directed that the "times, places, and terms of selling the property shall be agreed on by the trustee and the majority in interest of the first and second class creditors," and that if they did not agree, then two-thirds of all of the creditors should direct such "times, places, and terms." The court said there seemed to be but one question to consider, and that turned entirely upon the construction to be placed upon the words "terms of selling," whether these words in the deed of trust embraced the power to sell upon credit. Continuing, it was said that the courts generally held that deeds of assignment, giving authority to the assignee to sell upon credit, were fraudulent and void as to creditors not assenting thereto, and especially was this the case where the deeds made preferences between creditors. In New York this general rule is fully recognized. The case of Kellogg v. Slauson,[2] at first reading would seem to be a departure from the rule, but upon a more careful consideration it will be found to be consistent with it. The assignees in that case were authorized to sell the property "on such terms as in their judgment might be best for the parties concerned, and convert the same into money." The court, in upholding the assignment said that this discretion must be exercised within legal limits. In Brigham v. Tillinghast[3] the case of Kellogg v. Slauson is referred to, and the court says that the words "convert the same into money," limited the disposition of the property to sales for cash, and that such was the purport of the ruling in that case. The same rule is reiterated in Rapalee v. Stewart.[4] The assign-

[1] 2 Utah 499. See McCleery v. Allen, 7 Neb. 21.

[2] 11 N. Y. 302.

[3] 13 N. Y. 215.

[4] 27 N. Y. 311. "The true rule to be observed is this: An insolvent debtor may make an assignment of all his estate to trustees to pay his debts with or without preferences; but such assignees are bound to make an immediate application of the property. And any provision contained in the assignment which shows that the debtor, at the time of its execution, intended to prevent such immediate application, will avoid the instrument, because it

ment held to be valid in the case of Sumner v. Hicks[1] contained language similar to that found in Kellogg v. Slauson, and indeed the closing words of the objectionable provision were precisely the same, viz.: "And convert the same into money."[2] The inference from these cases is that if these last words had been omitted the assignments would have been held void as authorizing sales upon credit.

The word "term" signifies, among other things, "a limit," "a boundary." If we say the power of sale is granted without "limit," without "boundary," it can be exercised to an unlimited extent and without bounds. In the case of Beus v. Shaughnessy[3] there was no restriction whatever upon the power of sale granted to the trustees and a fixed proportion of the creditors. They were authorized to sell upon such "terms" as they might deem proper, and this power had no limits, no bounds. This broad grant certainly would necessarily embrace the power to sell upon credit.

§ 333. — In Wisconsin, in the case of Hutchinson v. Lord,[4] where the assignment empowered the assignee to sell in such manner and "upon such terms and for such prices as to him shall seem advisable," it was held that this language gave power to sell upon credit, which would necessarily operate to hinder and delay creditors, and rendered the assignment fraudulent and void. In the case of Keep v. Sanderson,[5] although the objectionable words were exactly those found in Kellogg v. Slauson, yet the court held that they conferred an authority to sell upon credit, and thus

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shows that it was made with 'intent to hinder and delay creditors in the collection of their debts.' Such an intent expressed in the instrument or proved *aliunde*, is fatal alike by the language of our statute and the well-settled adjudications of the English and American courts." Brigham v. Tillinghast, 13 N. Y. 215–220.

[1] 2 Black 532.

[2] See Keep v. Sanderson, 12 Wis. 362.

[3] 2 Utah 499.

[4] 1 Wis. 286.

[5] 2 Wis. 42.

avoided the whole assignment. In Woodburn v. Mosher[1] the authority to the assignees was to convert the property into money "within convenient time as *to them* shall seem meet." It was held that the assignment was void upon its face. In Keep v. Sanderson[2] it was decided that a clause in an assignment authorizing the assignee to sell and dispose of the assigned property "upon such terms and conditions as in his judgment may appear best and most to the interest of the parties concerned," was authority to sell on *credit*, and that it was void as to creditors, in accordance with the decision on the former appeal.[3]

§ 334. **Exempting assignee from liability.**—Another subterfuge of insolvent debtors must be noticed. In De Wolf v. Sprague Mfg. Co.[4] the deed contained a clause which provided that "in case the same (meaning the mill, etc.) are thus run by him or otherwise, he shall not be liable personally for the expenses or losses arising therefrom, but the same shall be chargeable to the trust fund vested in him." This was held in connection with the right to run the mills and print works, to furnish additional evidence of the fraudulent purpose for which the assignment was executed. A failing debtor cannot be permitted to put at hazard the trust fund which justly belongs to his creditors by authorizing the trustee to manage it without due prudence and caution. This question was before the New York Court of Appeals in Litchfield v. White.[5] In that case the assignment contained a clause by which it was mutually agreed between the parties to it that the assignee should not be held liable or accountable for any loss that might result to the trust property or the proceeds of it, unless the same

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[1] 9 Barb. (N. Y.) 255.

[2] 12 Wis. 361.

[3] A trustee in bankruptcy may sell the property of the estate on credit where he deems such action most for the benefit of creditors. Traer v. Clews, 115 U. S. 528.

[4] 49 Conn. 328.

[5] 7 N. Y. 442.

should happen by reason of the gross negligence or willful misfeasance of the assignee. The assignment was adjudged void. Chief-Justice Ruggles said: "A failing debtor by an assignment puts his property where it cannot be reached by ordinary legal process. He puts it into the hands of a trustee of his own selection, often his particular friend, sometimes a man to whom the creditors would not have been willing to confide such a trust. The debtor has an interest in the application of the trust funds to the payment of his debts; but the creditors have usually a far greater interest therein; and that interest depends in many cases on the competency and diligence of the assignee. The debtor cannot be permitted, by creating a trust for his creditors, to place his property where it cannot be reached by ordinary legal remedy, and at the same time exempt the trustee from his proper responsibility to his creditors."[1]

§ 335. **Providing for counsel fees.**—The question of the right of the assignor to provide for or interfere in the matter of the assignee's counsel fees has been before the courts in various forms. In Heacock v. Durand[2] the assignee was a lawyer, and by the provisions of the assignment was to be entitled to "a reasonable and lawful compensation or commission for his own services, both as assignee as aforesaid, and as the lawyer, attorney, solicitor, and counsel in the premises." The assignment was annulled on the theory that the power given to charge counsel fees tended so directly to the impairment of the fund and the injury of creditors, that it was impossible to offer a valid reason in its support. The provision places the assignee in two inconsistent positions. This question was before the New York Court of Appeals in Nichols v. McEwen,[3] and the

[1] Compare Casey v. Janes, 37 N. Y. 611; Matter of Cornell, 110 N. Y. 357; Matter of Dean, 86 N. Y. 398, as to duties of assignee.

[2] 42 Ill. 231.

[3] 17 N. Y. 22.

court held that such a clause was fraudulent in its character, and would vitiate the assignment. Roosevelt, J., observed that to sanction such a clause "would be establishing a practice pregnant in many cases with the most mischievous consequences." Denio, J., says, that an insolvent debtor has no right "to create such an expensive agency for the conversion of his property into money, and distributing it among his creditors. Besides being wrong in principle, it is calculated to lead to obvious abuses."[1] It is no objection, however, to the instrument, that provision is made for the payment of a reasonable attorney's fee for the examination of the facts, and for advice and services in drawing up the assignment and securing it to be properly acknowledged and placed on record. But at this point the control of the assignor ceases.[2]

§ 336. **Authority to compromise.**—The authority given to the assignees "to compromise or compound any claim by taking a part for the whole, when they shall deem it expedient so to do," was considered by the New York Supreme Court not to expressly authorize or require an illegal act to be done, and the court refused to vitiate the assignment.[3] And where the instrument authorized the assignee to compound "choses in action, taking a part for the whole when he shall deem it expedient," the assignment was sustained. This clause was held to vest no arbitrary power in the assignee to compromise where such action was neither necessary nor proper, but merely to confer the discretion which the law recognizes to compound doubtful and dangerous debts in cases where the safety and interest of the fund demanded such action. "It confers upon the assignee," said Finch, J., "no unlawful or arbitrary power, and takes away from the creditors no just protection."[4] On the other hand,

[1] Compare Campbell v. Woodworth, 24 N. Y. 305; Dimon v. Hazard, 32 N. Y. 71.

[2] Hill v. Agnew, 12 Fed. Rep. 233.

[3] Ginther v. Richmond, 18 Hun (N. Y.) 234.

[4] Coyne v. Weaver, 84 N. Y. 391; S. C. 1 Am. Insolv. Rep. 395; S. P.

the power given in the assignment to the assignee to compromise with creditors, is held to restrain the creditors until the attempt to compromise is made. Thus they would be hindered, and a delay even for a single day would be fatal to the assignment, and whether the delay was directed by the instrument, or justified by its provisions, or made necessary in the execution of its provisions, made no difference.[1]

§ 337. **Fraud of assignee.**—The fiduciary character of his position precludes the assignee from taking any advantage of his influence as such, or from using, for purposes of personal gain or profit, any information acquired while acting in that capacity. Every agreement having such an object in view, made with the assignors, or with any of the creditors, especially if not approved by and communicated to all the parties in interest, is looked upon by the courts with great suspicion and distrust, and if tainted with the slightest evidence of fraud, concealment, or misconduct on the part of the assignee in its procurement, will be set aside as inequitable and unjust, and he will not be permitted to reap any personal advantage from it.[2]

An assignment honestly made for a lawful purpose cannot be defeated by proof that the assignee abused his trust, misappropriated the property, or acted dishonestly in its disposal.[3] Where the assignee is guilty of neglect or misfeasance, the creditor feeling aggrieved should apply to the court for a compulsory accounting,[4] or seek his removal, and secure the appointment of a new trustee or assignee.[5] Brown, J., said, in Olney v. Tanner:[6] "If an assignment

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McConnell v. Sherwood, 84 N. Y. 522; Bagley v. Bowe, 105 N. Y. 177.

[1] McConnell v. Sherwood, 84 N. Y. 531.

[2] Clark v. Stanton, 24 Minn. 232; S. C. 1 Am. Insolv. Rep. 86.

[3] Cuyler v. McCartney, 40 N. Y. 237; Olney v. Tanner, 10 Fed. Rep. 114, 115; Eicks v. Copeland, 53 Tex. 581.

[4] Shattuck v. Freeman, 1 Met. (Mass.) 15.

[5] Olney v. Tanner, 10 Fed. Rep. 115. Compare Glanny v. Langdon, 98 U. S. 29, and cases cited. Benfield v. Solomons, 9 Ves. 83; Matter of Cohn, 78 N. Y. 248; S. C. 1 Am. Insolv. Rep. 221.

[6] 10 Fed. Rep. 114, 115.

is legally complete and perfect, and is intended to devote, and does devote, all the debtor's property to the payment of his debts, it cannot be invalidated through the subsequent remissness or inefficiency of the assignee. Creditors have ample remedy against the assignee for his misconduct, if any; and they should be held to these remedies, rather than be allowed to subvert the assignment on the claim that such remissness is an evidence of original fraudulent intent."[1] On the other hand, if the assignment is set aside as fraudulent, the acts of the assignee, performed in good faith in the execution of the trust, will not be disturbed; whether the assignment be fraudulent in fact or constructively so, the assignee will not be held to account for the property or its proceeds which have been paid out by him in good faith.[2]

§ 338. **Ignorance or incompetency of assignee as badge of fraud.**—The selection of an incompetent assignee is regarded in the law as a badge of fraud.[3] Blindness in the assignee is considered an *indicium* of fraud on the part of the assignor who selects him.[4] So, choosing an insolvent assignee is *prima facie* evidence of an intent to defraud;[5] as is the selection of an assignee unfit to attend to business by rea-

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[1] Citing Hardmann v. Bowen, 39 N. Y. 200; Shultz v. Hoagland, 85 N. Y. 465.

[2] Smith v. Craft, 11 Biss. 351; Wakeman v. Grover, 4 Paige (N. Y.) 23. In Pennsylvania the assignment vests the title although the assignee may be ignorant of the assignment; it is valid whether the assignee accepts the trust or not, for a trust will not fail for want of a trustee (Mark's Appeal, 85 Pa. St. 231; s. c. *sub nom.* First Nat. Bank of Newark v. Holmes, 1 Am. Insolv. Rep. 150. See Johnson v. Herring, 46 Pa. St. 415; Blight v. Schenck, 10 Pa. St. 285), but in New York the trust must be assented to, and the instrument acknowledged by the assignee. Rennie v. Bean, 24 Hun (N. Y.) 123; s. c. 1 Am. Insolv. Rep. 420; Hardmann v. Bowen, 39 N. Y. 196; Britton v. Lorenz, 45 N. Y. 51. If a party allows his name to be used in a fraudulent assignment and suffers the property to be squandered he may be compelled to account to creditors. Hughes v. Bloomer, 9 Paige (N. Y.) 269.

[3] Guerin v. Hunt, 6 Minn. 395.

[4] See Cram v. Mitchell, 1 Sandf. Ch. (N. Y.) 252.

[5] Reed v. Emery, 8 Paige (N. Y.) 417.

son of a lingering disease.[1] It was with much doubt and hesitation that entire latitude in the selection of the trustee or assignee was confided to the debtor,[2] and the insolvent having the choice of his own assignee,[3] without consultation with or consent of his creditors, must see to it that he appoints a person competent to protect the rights of all parties interested under the assignment. If it appears that the selection of an incompetent assignee was made in order to allow the assignor to control the administration of the estate, then the assignment will be avoided, because such an intent would be a fraud upon creditors. Where the assignee, however, is selected without any improper motive, and proves incompetent, he may be removed upon a proper application, and a suitable person substituted by the court to carry out the trust.[4] The words "misconduct" and "incompetency," as used in the New York statute relating to the removal of an assignee, are construed to have no technical meaning, but were intended to embrace all the reasons for which an assignee ought to be removed.[5]

§ 339. Transfers inuring as assignments.—Preferences in the absence of a bankrupt act are usually upheld, though avoided by the statutory system prevailing in some parts of the Union. A curious policy exists upon this subject in some of the States. Thus in Alabama it is said to be a settled proposition of law that a mortgage or deed of trust

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[1] Currie v. Hart, 2 Sandf. Ch. (N. Y.) 353.

[2] See Cram v. Mitchell, 1 Sandf. Ch. (N. Y.) 253.

[3] See Burr v. Clement, 9 Col. 1.

[4] See Guerin v. Hunt, 6 Minn. 395.

[5] Matter of Cohn, 78 N. Y. 248; S. C. 1 Am. Insolv. Rep. 223. As to the effect of the selection of an incompetent assignee, see Jennings v. Prentice, 39 Mich. 421; Connah v. Sedgwick, 1 Barb. (N. Y.) 210; Shryock v. Waggoner, 28 Pa. St. 430; Shultz v. Hoagland, 85 N. Y. 464; Baldwin v. Buckland, 11 Mich. 389; Matter of Cohn, 78 N. Y. 248; S. C. 1 Am. Insolv. Rep. 221; Montgomery v. Kirksey, 26 Ala. 172; Burrill on Assignments, 5th ed., § 92. The fact that the assignee is required to give a bond will not relieve the assignor from the exercise of prudence in his selection. Holmberg v. Dean, 21 Kans. 73.

which conveys *substantially all the debtor's property* for the security of one or more particular creditors to the exclusion of others, the intention of which is to give a preference or priority of payment to the former, operates as a general assignment under the statute, and inures to the benefit of all the creditors equally.[1] In Illinois the surrender by an insolvent of dominion over his entire estate, with intent to evade the operation of the assignment act, and to create preferences, whether made by one or more instruments, operates as an assignment under the act, the benefit of which can be claimed by any unpreferred creditor.[2] In New York, however, it was held that a specific assignment of property by a debtor for the benefit of one or a portion of his creditors did not come within the provisions of the assignment act of that State, and was not void by reason of its not being executed in compliance with the provisions of the assignment act.[3]

§ 340. **Assets exceeding liabilities.**—The question often arises as to what persons are entitled to make assignments. Where it is clear that the assets are largely in excess of the liabilities of the debtor, it may raise a presumption of an intent to hinder and delay creditors in the collection of their just demands, and amount to a *prima facie* case of fraud.[4] In the Missouri Court of Appeals an assignment which, after reciting that the assets amounted to three times the liabilities, clothed the trustees with discretionary power to carry on the business of the firm "for such time as the trustees shall deem for the best interest of the cred-

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[1] Shirley v. Teal, 67 Ala. 451; Code, Ala. (1876), § 2126; Warren v. Lee, 32 Ala. 440; Stetson v. Miller, 36 Ala. 642.

[2] White v. Cotzhausen, 129 U. S. 329. See Kellog v. Richardson, 19 Fed. Rep. 70, 72; Martin v. Hausman, 14 Fed. Rep. 160; Freund v. Yaegerman, 26 Fed. Rep. 812, 814; Perry v. Corby, 21 Fed. Rep. 737; Clapp v. Dittman, 21 Fed. Rep. 15; Kerbs v. Ewing, 22 Fed. Rep. 693.

[3] Royer Wheel Co. v. Fielding, 101 N. Y. 504.

[4] Livermore v. Northrup, 44 N. Y. 109; Guerin v. Hunt, 8 Minn. 477. See Bates v. Ableman, 13 Wis. 644.

itors, and necessary for the purpose of preventing shrinkage and loss, and of closing out and liquidating the same to the best advantage," was declared voidable as tending to hinder, delay, and defraud creditors.[1] It is sometimes contended that, as assignments for the benefit of creditors are generally made by embarrassed and insolvent debtors, such dispositions of property can only be made by that class of persons. "This doctrine," said Comstock, J., "has no foundation in principle or authority. These assignments are in their nature simply trusts for the payment of debts. The power to create such trusts is certainly not peculiar to insolvent men. On the contrary it is a power more unquestionably possessed by men who are entirely solvent. . . . . This right of disposition, on general principles of law and justice, was never doubtful except in case of a debtor's inability to meet his engagements. In that condition the claims of creditors are in justice paramount, and the debtor's power to dispose of his estate, even for their benefit, was not established without a struggle. In short, it was the insolvency rather than the solvency of a debtor which suggested the doubt in regard to the right of putting the whole or any part of his property in trust for the benefit of creditors."[2] As gathered from the authorities, the vital question in these cases is, whether the transfer is honestly made with the sole intention of applying the property in satisfaction of the creditors' demands, or whether it is merely a scheme or contrivance to place the debtor's estate, for a time, beyond the reach of the creditors' remedies, prevent a sacrifice of the property, secure the payment of the creditors' claims, and ultimately realize a surplus to the assignor. In the latter case it should clearly be regarded as a plan devised to hinder and delay creditors. Resort by a solvent man to the methods devised for insolvents is justly

[1] First Nat. Bank v. Hughes, 10 Mo. App. 14.

[2] Ogden v. Peters, 21 N. Y. 24.

calculated to arrest attention and excite the most searching inquiry as to hidden motives.

§ 341. **Assignments to prevent preference.**—According to the doctrines of the common law, the validity of an assignment cannot be assailed simply because its effect is to prevent a party from obtaining, by judgment and execution, a priority and preference over other creditors.[1] Temporary interference with particular creditors in the prosecution of their claims by the ordinary legal remedies, is a necessary and unavoidable incident to a just and lawful act, which, however, in no respect impairs the validity of the transaction.[2] The rule of equity requires the equal and ratable distribution of the debtor's property for the benefit of all his creditors. It would be strange indeed if the debtor, by making a disposition of his property with the design to effectuate the application of this rule, should be adjudged guilty of hindering and delaying his creditors. This precise question arose in Pickstock v. Lyster.[3] In that case a debtor, being sued, made an assignment by deed of all his effects, for the equal benefit of his creditors. The jury having been instructed that they must find the deed void if made with the intent to defeat the plaintiff in his execution, returned a verdict in his favor. But the verdict was set aside upon the ground that the jury were misdirected. Lord Ellenborough held that the assignment was "to be referred to an act of duty rather than of fraud, when no purpose of fraud is proved. The act arises out of a discharge of the moral duties attached to his character of debtor, to make the fund available for the whole body of creditors. . . . . It is not the debtor who breaks in upon the rights of the parties by this assignment, but the creditor who breaks in upon them by proceeding in his suit. I see no fraud; the deed was for the fair pur-

[1] Reed v. McIntyre, 98 U. S. 510. See Chap. XXV.

[2] Mayer v. Hellman, 91 U. S. 500.

[3] 3 Maule & S. 371.

pose of equal distribution." In the same case, Bayley, J., said: "It seems to me that this conveyance, so far from being fraudulent, was the most honest act the party could do. He felt that he had not sufficient to satisfy all his debts, and he proposed to distribute his property in liquidation of them; this was not acceded to, for the plaintiff endeavored by legal process to obtain his whole debt, the obtaining of which would have swept away the property from the rest of the creditors."[1] If the assignment has been fairly and legally made, and creditors obtain a benefit from it, their rights cannot be divested by proof of any stratagem practiced by the assignor to prevent attachments till this object could be secured. If no attachments were issued, even fraud practiced by the debtors to defeat such process would give the creditor no lien upon the property; notwithstanding the grossest dishonesty of this kind, it would remain as it was; and so long as it continued the property of the debtors, unaffected by any attachments, no fraudulent conduct, calculated to impose upon a creditor and keep him at bay, would disqualify the debtor from making a valid assignment under the statute for the benefit of creditors generally.[2] Fraud or misrepresentation on the part of the assignor, entering into or affecting the debt of a particular creditor, will not be sufficient to annul a general assignment in favor of creditors.[3]

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[1] See Pike v. Bacon, 21 Me. 281; Hauselt v. Vilmar, 2 Abb. N. C. (N. Y.) 222, affi'd 76 N. Y. 630; Baldwin v. Peet, 22 Tex. 708; Bowen v. Bramidge, 6 C. & P. 140. See Holbird v. Anderson, 5 T. R. 235. It is said, however, in Dalton v. Currier, 40 N. H. 246, that as the avowed purpose and aim of the assignment, and its only object and consideration, as stated in the instrument, was to defeat the liability of the property to be attached, whereby some of the creditors might obtain an unjust preference, and to secure it to be applied for the benefit of all the creditors, the assignment was fraudulent and void.

[2] Pike v. Bacon, 21 Me. 286.

[3] Kennedy v. Thorp, 51 N. Y. 174; Spencer v. Jackson, 2 R. I. 35; Lininger v. Raymond, 12 Neb. 19; Horwitz v. Ellinger, 31 Md. 504. But compare Waverly Nat. Bank v. Halsey, 57 Barb. (N. Y.) 249.

Jaques v. Greenwood[1] constitutes a possible exception to the rule above stated. A judgment had been entered against a firm by default; they secured a stay of proceedings upon pretence of a defense to the action, which they failed to show, and upon an assurance given by their attorney that no assignment would be made. Meanwhile a preferential assignment was filed, and the judgment-creditors were prevented from realizing anything upon execution. The assignment was, upon this state of facts, adjudged to be made to hinder and delay the creditors in the collection of their debt.

§ 342. **Threatening to make assignment.**—Threatening to make an assignment seems to constitute no ground for provisional relief by attachment in New York,[2] provided the threat is not to make a fraudulent assignment. "An unlawful coercion of a creditor," says Fullerton, J., "cannot be predicated of the declaration of an intention by a debtor to do what the law sanctions as right and proper."[3]

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[1] 12 Abb. Pr. (N. Y.) 234.

[2] Kipling v. Corbin, 66 How. Pr. (N. Y.) 13; Evans v. Warner, 21 Hun (N. Y.) 574; Dickerson v. Benham, 20 How. Pr. (N. Y.) 343.

[3] Spaulding v. Strang, 37 N. Y. 139. In the case of National Park Bank v. Whitmore, 104 N. Y. 305, Earl, J., said: "But we think there were sufficient facts set forth in the affidavits to give the court jurisdiction to determine whether or not the defendants in threatening to make, and in making the assignment, were actuated by a fraudulent intent. A few days before the assignment was made the defendants reported that they were entirely solvent and could pay all their debts in full, and they made a statement of their affairs showing a large surplus of assets over liabilities. Soon after these representations they claimed that they could not pay their debts in full, and that they were insolvent, and proposed to their creditors a compromise of fifty cents on the dollar, payable in nine, twelve, and fifteen months without security. The evidence tended to show that they had been engaged in a prosperous business, yielding them large profits, and they gave no satisfactory or intelligible explanation of their sudden alleged insolvency. They threatened that unless their offer of compromise was accepted they would make an assignment, preferring Whiting, and that then the rest of their creditors would get little or nothing. The efforts of the defendants, with the co-operation of their assignee after the assignment, apparently to coerce a compromise at twenty-five cents on the dollar, their offer 'to fix it up' with a creditor afterward if he would assent to the compromise, their selection of a foreign assignee, the relations between him and

On the other hand there are cases tending to support the view that a debtor cannot use the power he possesses of assigning his property preferentially to intimidate creditors into abstaining from pressing the remedies allowed by law to collect debts, without being chargeable with intent to defraud creditors.[1] In Gasherie v. Apple[2] the court observed: "The law allows a debtor to assign his property to pay his debts, and even to make preferences; but compels him to make his selection without any conditions for personal gain to himself; thus he cannot, by an assignment, hold out a hope of an extra share of his assets, or a fear of loss of any participation therein, as a means to induce a creditor to abandon all, or any part of his claim, or to forbear pursuing his legal remedies therefor." This certainly embodies the safer rule.

§ 343. **Construction of assignments.**—In construing the provisions of a general assignment, we are to be governed by the rules applicable to ordinary conveyances.[3] Preferential assignments are not to be encouraged.[4] The law tolerates rather than approves such instruments, and they can only be supported when they make a full and unconditional surrender of the property to the payment of debts.[5] In Read v. Worthington,[6] in construing a general assign-

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them, and the secret promise of a future preference, are also pertinent facts. The court at General Term, looking at no one fact, but at all the facts, before and after the assignment, could, we think, find that the assignment was threatened and made by the assignors, not solely for the honest purpose of devoting their assets to the payment of their just debts, but, while not actually insolvent, to coerce a favorable compromise from their creditors, and thus secure a benefit to themselves."

[1] See Anthony v. Stype, 19 Hun (N. Y.) 267; Gasherie v. Apple, 14 Abb. Pr. (N. Y.) 64; Livermore v. Rhodes, 27 How. Pr. (N. Y.) 506.

[2] 14 Abb. Pr. (N. Y.) 64, 68.

[3] Townsend v. Stearns, 32 N. Y. 213; Bagley v. Bowe, 105 N. Y. 171; Knapp v. McGowan, 96 N. Y. 75; Crook v. Rindskopf, 105 N. Y. 485; Ginther v. Richmond, 18 Hun (N. Y.) 234. Compare Rapalee v. Stewart, 27 N. Y. 315.

[4] Nichols v. McEwen, 17 N. Y. 24. See Boardman v. Halliday, 10 Paige (N. Y.) 230.

[5] Griffin v. Barney, 2 N. Y. 371.

[6] 9 Bosw. (N. Y.) 626. In Crook v. Rindskopf, 105 N. Y. 485, Ruger, Ch.

ment, the court said: "There are three general rules of interpretation, which, applied to this case, show that the intent on the face of the instrument was honest to creditors: Firstly, that the general intent of the parties is to govern; secondly, that the leaning of all constructions should be in favor of supporting, and not overthrowing, an instrument; and thirdly, that fraud is not to be presumed,[1] and assignments are subject to no different rules."[2] Courts are therefore under no obligation to be astute to destroy them,[3] and an unreasonable construction should not be given to the language used in the assignment to render it void.[4] The scope of the assignment is to be gathered from

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J., said: "While heretofore there has been some diversity of opinion in the courts in respect to the proper rule to be applied in the construction of such instruments, we think the tendency of modern decisions, especially those of most approved authority, has been to adopt the same rules which obtain in the interpretation of other contracts. (Knapp v. McGowan, 96 N. Y. 75, 87; Rapalee v. Stewart, 27 N. Y. 310, 315; Benedict v. Huntington, 32 N. Y. 219; Townsend v. Stearns, 32 N. Y. 209.) Among those rules is that requiring such an interpretation as will render the instrument consistent with innocence, and the general rules of law, in preference to such as would impute a fraudulent intent to the assignor, or defeat the general purpose and intent of the conveyance. (Bagley v. Bowe, 105 N. Y. 171; Ginther v. Richmond, 18 Hun [N. Y.] 232, 234; Rapalee v. Stewart, 27 N. Y. 315; Benedict v. Huntington, 32 N. Y. 219; Townsend v. Stearns, 32 N. Y. 209.) Such transfers are sanctioned by law and are, when made, like other contracts, to be fairly and reasonably construed with a view of carrying out the intentions of the parties making them. When authority to do an act is conferred in general terms it will be deemed to be and to have been intended to be exercised within the limits prescribed by law. (Kellogg v. Slauson, 11 N. Y. 302.) In such cases, as in others, doubtful and ambiguous phrases admitting of different meanings, are, in accordance with the maxim, '*ut res magis valeat quam pereat*,' to be so construed as to authorize a lawful disposition of the property only, although there may be general language in the instrument susceptible of a different construction. (Townsend v. Stearns, 32 N. Y. 209.)"

[1] Citing Kellogg v. Slauson, 15 Barb. (N. Y.) 56; Kellogg v. Barber, 14 Barb. (N. Y.) 11; Barnum v. Hempstead, 7 Paige (N. Y.) 569; Kuhlman v. Orser, 5 Duer (N. Y.) 250; Bank of Silver Creek v. Talcott, 22 Barb. (N.Y.) 561. See §§ 5, 6.

[2] Citing Pine v. Rikert, 21 Barb. (N. Y.) 469.

[3] See Turner v. Jaycox, 40 Barb. (N. Y.) 164; affi'd, 40 N. Y. 470. Especially Townsend v. Stearns, 32 N. Y. 209; Grover v. Wakeman, 11 Wend. (N. Y.) 193; Kellogg v. Slauson, 11 N. Y. 302.

[4] Whipple v. Pope, 33 Ill. 334.

the whole instrument,[1] and where two constructions are possible, that is to be chosen which upholds and does not destroy the instrument.[2] "A court," said Finch, J., "may wrestle, if need be, with unwilling words to find the truth or preserve a right which is endangered."[3] It must be remembered that if a general clause be followed by special words which accord with the general clause, the deed should be construed according to the special matter.[4] The case may, however, be taken out of its operation by the evident intent of the parties and the clearly expressed purpose of the deed.[5] Thus where the instrument under consideration is a general assignment of all the property and effects of the assignor, and the intent to place all the property of every description within the trust is apparent in every part of the deed, although it contain a reference to a schedule of the assigned effects as annexed, this will not be construed as indicating an intention to qualify or limit the comprehensive or general language, and property not mentioned in the schedule will pass to the trustee.[6]

§ 344. **Explaining obnoxious provisions.**—When it is shown that the obnoxious provisions of the deed were not made deliberately, understandingly, or even knowingly, then the law's presumption of the intent to defraud is rebutted. The reason ceasing the rule ceases. In an inquiry collateral to the deed it is competent to show by parol that the deed was made in its objectionable form by the mistake of

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[1] Price v. Haynes, 37 Mich. 487; S.C. 1 Am. Insolv. Rep. 137.

[2] Coyne v. Weaver, 84 N. Y. 390. See Townsend v. Stearns, 32 N. Y. 209; Brainerd v. Dunning, 30 N. Y. 211; Campbell v. Woodworth, 24 N. Y. 304; Benedict v. Huntington, 32 N. Y. 219; Coffin v. Douglass, 61 Tex. 406.

[3] Coyne v. Weaver, 84 N. Y. 390; S. C. 1 Am. Insolv. Rep. 392. A voluntary assignment act is to be liberally construed. White v. Cotzhausen, 129 U. S. 329, and cases cited.

[4] Munro v. Alaire, 2 Caines (N. Y.) 320. See Moore v. Griffin, 22 Me. 350; Wilkes v. Ferris, 5 Johns. (N. Y.) 335.

[5] Platt v. Lott, 17 N. Y. 478.

[6] Holmes v. Hubbard, 60 N. Y. 185; Turner v. Jaycox, 40 N. Y. 470; Emigrant Ind. Sav. Bank v. Roche, 93 N. Y. 377.

the scrivener, and without the intention and knowledge of the parties to it, and so to rebut the presumption of fraud.[1]

§ 345. **Assignments held void.**—It would be an arduous task to collate and cite the numerous cases in which assignments have been overturned at the instigation of creditors. The important features of the law will, however, be noticed. The instrument was avoided where it provided that the debtor "shall have the privilege of continuing his business for one year."[2] In fact any reservation of benefit to the grantor is considered fatal.[3] Stipulating for possession of the assigned property,[4] and providing for the payment of individual debts out of copartnership assets,[5] are additional illustrations of obnoxious provisions which will annul the instrument.[6] So, as we have seen, the instrument is rendered void by intentional omissions of assets,[7] and the insertion of fictitious liabilities.[8] The insertion of a provision for the employment of the assignors furnishes some evidence of fraudulent intent.[9]

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[1] Farrow v. Hayes, 51 Md. 500, 501. See Carpenter v. Buller, 8 M. & W. 212; Parks v. Parks, 19 Md. 323; Smith v. Davis, 49 Md. 470.

[2] Holmes v. Marshall, 78 N. C. 262.

[3] Cheatham v. Hawkins, 76 N. C. 335; Bigelow v. Stringer, 40 Mo. 195; Griffin v. Barney, 2 N. Y. 371; Leitch v. Hollister, 4 N. Y. 211; Mackie v. Cairns, 5 Cow. (N. Y.) 547; Harris v. Sumner, 2 Pick. (Mass.) 129; Burrill on Assignments, 4th ed., § 343, p. 514.

[4] Billingsley v. Bunce, 28 Mo. 547; Reed v. Pelletier, 28 Mo. 173; Brooks v. Wimer, 20 Mo. 503; Stanley v. Bunce, 27 Mo. 269. See Cheatham v. Hawkins, 76 N. C. 335; Harman v. Hoskins, 56 Miss. 142; Joseph v. Levi, 58 Miss. 843.

[5] Wilson v. Robertson, 21 N. Y. 587; Schiele v. Healy, 61 How. Pr. (N. Y.) 73; S. C. 1 Am. Insolv. Rep. 417; Platt v. Hunter, 11 Weekly Dig. (N. Y.) 300. But see Crook v. Rindskopf, 105 N. Y. 476.

[6] An assignment is invalid as a conveyance of a debtor's estate under the insolvency statutes of New York (2 R. S., p. 16), when the preliminary proceedings upon which it is based are void. Rockwell v. McGovern, 69 N. Y. 294; S. C. 1 Am. Insolv. Rep. 59. See Ely v. Cooke, 28 N. Y. 365. But compare Striker v. Mott, 28 N. Y. 90. In such a case the only beneficial interest vested in the assignee is that prescribed by the statute.

[7] Probst v. Welden, 46 Ark. 409; Shultz v. Hoagland, 85 N. Y. 464; Waverly Nat. Bank v. Halsey, 57 Barb. (N.Y.) 249; Craft v. Bloom, 59 Miss 69.

[8] Talcott v. Hess, 31 Hun (N. Y.) 282.

[9] Frank v. Robinson, 96 N. C. 32.

§ 346. **Foreign assignments.**—The rule generally obtains that the statute laws of a particular State regulating assignments for the benefit of creditors, do not apply to foreign assignments;[1] such transfers, if valid by the law of the place where made, are valid everywhere, and will protect the property from attachment,[2] except perhaps as regards creditors who are residents of the particular State in which it is sought to enforce the provisions of the instrument. As the foreign assignment is allowed to operate as a matter of comity, the courts sometimes refuse to enforce it to the prejudice of their own citizens.[3] Manifestly an assignment will not take effect to pass title to personal property situate in another State in express contravention of the statute law of that State.[4] The distinction should not be overlooked between assignments by act of the party and those by operation of law. The latter class of conveyances are generally founded upon statutory provisions, and have no extraterritorial force.[5] This, however, is a line of inquiry foreign to our subject.

§ 346*a*. **Assignments by corporations.**—Where charter restrictions or statutory inhibitions do not exist a corporation may make a general assignment.[6] Such a transfer is,

[1] Ockerman v. Cross, 54 N. Y. 29; Chafee v. Fourth Nat. Bank of N. Y., 71 Me. 524; Bentley v. Whittemore, 19 N. J. Eq. 462.

[2] Ockerman v. Cross, 54 N. Y. 29; Bholen v. Cleveland, 5 Mason 174.

[3] Chafee v. Fourth Nat. Bank, 71 Me. 524. See Matter of Waite, 99 N. Y. 433. Compare Train v. Kendall, 137 Mass. 366.

[4] Warner v. Jaffray, 96 N. Y. 248.

[5] See Hutcheson v. Peshine, 16 N. J. Eq. 167; Kelly v. Crapo, 45 N. Y. 86; reversed, Crapo v. Kelly, 16 Wall. 610. See § 294.

[6] Albany & R. Iron & S. Co. v. Southern Agricultural Works, 76 Ga. 135; De Ruyter v. St. Peter's Church, 3 Barb. Ch. (N. Y.) 124, affi'd 3 N. Y. 238; Haxtun v. Bishop, 3 Wend. (N. Y.) 13; Bowery Bank Case, 5 Abb. Pr. (N. Y.) 415; Hill v. Reed, 16 Barb. (N. Y.) 280; De Camp v. Alward, 52 Ind. 473; Nelson v. Edwards, 40 Barb. (N. Y.) 279; Union Bank of Tenn. v. Ellicott, 6 Gill & J. (Md.) 363; Savings Bank of New Haven v. Bates, 8 Conn. 505; Coats v. Donnell, 94 N. Y. 178; Chew v. Ellingwood, 86 Mo. 273; Lenox v. Roberts, 2 Wheat. 373; Warner v. Mower, 11 Vt. 385; Flint v. Clinton Co., 12 N. H. 431; *Ex parte* Conway, 4 Ark. 304; Catlin v. Eagle Bank, 6 Conn. 233; Ardesco Oil Co. v. North Am. Oil & M. Co., 66 Pa. St. 375.

however, prohibited by statute in New York,[1] and some other States.[2] Where assignments by corporations are allowed they are subject to attack "upon substantially the same grounds as in the cases of similar transfers by individuals."

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[1] 1 R. S. 605, § 1.

[2] See Wait on Insolvent Corps., Chap. VIII.

CHAPTER XXII.

FRAUDULENT CHATTEL MORTGAGES.

§ 347. Chattel mortgages.
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§ 347. **Chattel mortgages.**—Questions affecting the validity of chattel mortgages as against creditors are so largely dependent upon and regulated by local statutory provisions, that the general principles governing the subject can be discussed with but little satisfaction. Such mortgages are, as a general rule, valid between the parties,[1] even

[1] Stewart v. Platt, 101 U. S. 731; Hackett v. Manlove, 14 Cal. 85. See Lane v. Lutz, 1 Keyes (N. Y.) 213; Smith v. Acker, 23 Wend. (N. Y.) 653. See Chap. XXVI. In Stewart v. Platt, 101 U. S. 739, the court said: "Although the chattel mortgages, by reason of the failure to file them in the proper place, were void as against judgment-creditors, they were valid and effective as between the mortgagors and the mortgagee. Lane v. Lutz, 1 Keyes (N. Y.) 213; Wescott v. Gunn, 4 Duer (N. Y.) 107; Smith v. Acker, 23 Wend. (N. Y.) 653. Suppose the mortgagors had not been adjudged bankrupts, and there had been no creditors, subsequent purchasers, or mortgagees in good faith to complain, as they alone might, of the failure to file the mortgages in the towns where the mortgagors respectively resided. It cannot be doubted that Stewart, in that event, could have enforced a lien upon the mortgaged property in satisfaction of his claim for rent. The assignee took the property subject to such equities, liens, or incumbrances as would have affected it, had no adjudication in bankruptcy been made. While the rights of creditors whose executions preceded the bankruptcy were properly adjudged to be superior to any which passed to the assignee by operation of law, the balance of the fund, after satisfying those executions, belonged to the mortgagee, and not to the assignee for the purposes of his trust. The latter representing general creditors, cannot dispute such claim, since, had there been no adjudication, it could not have been disputed by the mortgagors." See Hauselt v. Harrison, 105 U. S. 406.

though not recorded;[1] and recording the instrument is made by statute in some States a substitute for change of possession, and repels the imputation of fraud which would arise from the retention of possession by the vendor.[2] Many questions concerning the validity of these instruments are to be found in the reports, only the more prominent of which will be noticed.

§ 348. **Rule in Robinson v. Elliott.**—The Supreme Court of the United States, in Robinson v. Elliott,[3] committed itself unreservedly to the doctrine that an instrument which provided for the retention of the possession of the mortgaged personalty by the mortgagor, accompanied with the power to dispose of it for his own benefit in the usual course of trade, was inconsistent with the idea of a security, or the nature and character of a mortgage, and of itself furnished a pretty effectual shield to a dishonest debtor, and consequently should be regarded as voidable as to creditors.[4] Davis, J., said: "In truth, the mortgage, if it can

[1] Stewart v. Platt, 101 U. S. 731; Lane v. Lutz, 1 Keyes (N. Y.) 213.

[2] See Bullock v. Williams, 16 Pick. (Mass.) 33; Feurt v. Rowell, 62 Mo. 524; Hughes v. Cory, 20 Iowa 403, and cases cited; Spraights v. Hawley, 39 N. Y. 441.

[3] 22 Wall. 513.

[4] See Worseley v. De Mattos, 1 Burr. 467, per Lord Mansfield; Edwards v. Harben, 2 T. R. 587; Bannon v. Bowler, 34 Minn. 418; Paget v. Perchard, 1 Esp. 205, per Lord Kenyon; Lang v. Lee, 3 Rand. (Va.) 410; Addington v. Etheridge, 12 Gratt. (Va.) 436; McLachlan v. Wright, 3 Wend. (N. Y.) 348; Edgell v. Hart, 9 N. Y. 213; Brackett v. Harvey, 91 N. Y. 214; Potts v. Hart, 99 N. Y. 168; Coburn v. Pickering, 3 N. H. 415; Bank of Leavenworth v. Hunt, 11 Wall. 391; Coolidge v. Melvin, 42 N. H. 520; Collins v. Myers, 16 Ohio 547; Chophard v. Bayard, 4 Minn. 533; Horton v. Williams, 21 Minn. 187; Bishop v. Warner, 19 Conn. 460; Place v. Langworthy, 13 Wis. 629; Blakeslee v. Rossman, 43 Wis. 116; Smith v. Ely, 10 N. B. R. 553; *In re* Cantrell, 6 Ben. 482; *In re* Kahley, 2 Biss. 383; Southard v. Benner, 72 N. Y. 424; *Ex parte* Games, 12 Ch. D. 314; Cheatham v. Hawkins, 80 N. C. 164; Tennessee Nat. Bank v. Ebbert, 9 Heisk. (Tenn.) 154; Joseph v. Levi, 58 Miss. 845; Harman v. Hoskins, 56 Miss. 142; Dunning v. Mead, 90 Ill. 379; Goodheart v. Johnson, 88 Ill. 58; Davenport v. Foulke, 68 Ind. 382; Barnet v. Fergus, 51 Ill. 352; Davis v. Ransom, 18 Ill. 396; Simmons v. Jenkins, 76 Ill. 479; Mobley v. Letts, 61 Ind. 11; Garden v. Bodwing, 9 W. Va. 122; City Nat. Bank v. Goodrich, 3 Col. 139; Sparks v. Mack, 31 Ark. 666; Orton v. Orton, 7 Oreg. 478; Peiser v. Peticolas, 50 Tex. 638; Scott

be so called, is but an expression of confidence, for there can be no real security where there is no certain lien. Whatever may have been the motive which actuated the parties to this instrument, it is manifest that the necessary result of what they did do was to allow the mortgagors, under cover of the mortgage, to sell the goods as their own, and appropriate the proceeds to their own purposes; and this, too, for an indefinite length of time."[1] It must be remembered that, in Twyne's Case, where the transfer was avoided, one of the objections urged against the transaction was that the debtor *used* the goods as his own.[2] Mr. Pierce observes: "A mortgage or conveyance of this kind presents a false appearance, is only a pretence as a mortgage, is calculated to deceive, cannot fail to deceive if it be operative, furnishes unusual facilities for fraud, reserves benefits to the grantor, and prejudices other creditors. When it thus appears that the transaction is, in its results, so fraudulent, and so injurious to creditors, that few transactions could be more so, even where an intent to defraud exists so as to bring them within the statute of 13 Eliz., the courts are as ready to adjudge the transaction fraudulent as they would be if a fraudulent intent appeared."[3]

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v. Alford, 53 Tex. 82; Weber v. Armstrong, 70 Mo. 217; Tallon v. Ellison, 3 Neb. 63; McCrasly v. Hasslock, 4 Baxt. (Tenn.) 1; Catlin v. Currier, 1 Sawyer 7. See "An American Phase of Twyne's Case," by James O. Pierce, Esq., 2 Southern L. Rev. (N. S.) 731; "Fraudulent Mortgages of Merchandise," by Leonard A. Jones, Esq., 5 Southern L. Rev. (N. S.) 617; "A Reply," by Mr. Pierce, 6 Southern L. Rev. (N. S.) 96; "Frauds in Chattel Mortgages," by Mr. Jones, 7 Southern L. Rev. (N. S.) 95; Reviewed by Ed. J. Maxwell, Esq., 7 Southern L. Rev. (N. S.) 205. This discussion relates mainly to Robinson v. Elliott, 22 Wall. 513. The controversy gave birth to a work entitled "Fraudulent Mortgages of Merchandise, a Commentary on the American Phases of Twyne's Case, by James O. Pierce," F. H. Thomas & Co., 1884. The positions taken by Mr. Pierce in the Law Review, in support of Robinson v. Elliott, are re-stated in this volume with commendable clearness and force, and the different authorities in State and Federal tribunals bearing upon the question are collated and discussed.

[1] Robinson v. Elliott, 22 Wall. 525. See Means v. Dowd, 128 U. S. 284.

[2] See § 22.

[3] Pierce on Fraudulent Mortgages of Merchandise, § 122.

§ 349. — In Edgell v. Hart[1] the license to sell was inferred from a written schedule attached to the instrument. Chief-Justice Denio held, with the concurrence of a majority of the court, that "the existence of such a provision out of the mortgage or in it, would invalidate it as matter of law, and that where the facts are undisputed this court should so declare."[2] "Such an agreement," said Finch, J., "opens the door to fraud, and permits the mortgagor to use the property for his own benefit, utilizing the mortgage as a shield against other creditors."[3] The debtor, in the language of Kent, "sports with the property as his own."[4] In Mittnacht v. Kelly,[5] Parker, J., observed: "The mortgaging the whole stock in trade, ... *with the increase and decrease thereof*, and the providing for the continued possession of the mortgagor, can have no other meaning than that the mortgagee should all the time retain a lien on the whole stock by way of mortgage, the mortgagor making purchases from time to time, and selling off in the ordinary manner, the intent being not to create an absolute lien upon any property, but a fluctuating one, which should open to release that which should be sold and take in what should be newly purchased. This is just such an arrangement as was held in Edgell v. Hart[6] to render the mortgage void. The case cannot be distinguished from that, and the law as pronounced in that case, must be held applicable to this." In Griswold v. Sheldon,[7] Bronson, C. J., says: "There would be no hope of maintaining honesty and fair dealing if the courts should allow a mortgagee or vendee to succeed in a claim to personal property against creditors

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[1] 9 N. Y. 213.

[2] Compare Gardner v. McEwen, 19 N. Y. 123; Mittnacht v. Kelly, 3 Keyes (N. Y.) 407; Russell v. Winne, 37 N. Y. 591.

[3] Brackett v. Harvey, 91 N. Y. 223, 224.

[4] Riggs v. Murray, 2 Johns. Ch. (N. Y.) 565.

[5] 3 Keyes (N. Y.) 407.

[6] 9 N. Y. 213.

[7] 4 N. Y. 590.

and purchasers, after he had not only left the property in the possession of the debtor, but had allowed him to deal with and dispose of it as his own." "To attempt," says Mr. Pierce,[1] "to fasten a valid and certain lien upon goods which may at any moment, at the will of the debtor, fly out from under the lien, is to attempt a legal and moral impossibility." It is a sham, a nullity—a mere shadow of a mortgage, only calculated to ward off other creditors—a conveyance in trust for the benefit of the person making it, and therefore void as against creditors.[2]

§ 350. **Proof extrinsic to the instrument.**—The rule as we have seen is the same, whether the agreement is recited in the instrument or is extrinsic to it.[3] Thus Allen, J., remarked: "Whether the agreement is in or out of the mortgage, whether verbal or in writing, can make no difference in principle. Its effect as characterizing the transaction would be the same. The difference in the modes of proving the agreement cannot take the sting out of the fact and render it harmless. If it is satisfactorily established, the result upon the security must be the same."[4] When not embodied in the instrument the agreement to sell must be proved. The mere expectation of one party or the other that this right is to be given is not enough; there must be a conscious assent of both.[5] In Potts v. Hart,[6] Earl, J., said: "A mortgage thus given is fraudulent and void as to creditors because it must be presumed that at least one of the purposes, if not the main purpose for giving it, was to cover up the mortgagor's property and thus hinder and delay his other creditors. It matters not whether the agree-

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[1] Pierce on Fraudulent Mortgages of Merchandise, § 125.

[2] Catlin v. Currier, 1 Sawyer 12.

[3] Edgell v. Hart, 9 N. Y. 213; McLean v. Lafayette Bank, 3 McLean 623; Bowen v. Clark, 1 Biss. 128; *In re* Kahley, 2 Biss. 383; *In re* Cantrell, 6 Ben. 482; Smith v. Ely, 10 N. B. R. 553; *Re* Kirkbride, 5 Dill. 116.

[4] Southard v. Benner, 72 N. Y. 432; s. p. Russell v. Winne, 37 N. Y. 591.

[5] Brackett v. Harvey, 91 N. Y. 224.

[6] 99 N. Y. 172.

ment that the mortgagor may continue to deal in the property for his own benefit is contained in the mortgage or exists in parol outside of it; and where the agreement exists in parol, it matters not whether it is valid so that it can be enforced between the parties or not; for whether valid or invalid it is equally effectual to show the fraudulent purpose for which the mortgage was given, and the fraudulent intent which characterizes it. It is always open to creditors to assail, by parol evidence, a mortgage or a bill of sale of property as fraudulent and void as to them. While between the parties the written contract may be valid, and the outside parol agreement may not be shown or enforced, yet it may be shown by creditors for the purpose of proving the fraudulent intent which accompanied and characterized the giving of the written instrument. It is usually difficult to prove by parol an agreement in terms that the mortgagor may continue to deal in the property for his own benefit. Parties concocting a fraudulent mortgage would not be apt to put the transaction in that unequivocal form. But all the facts and circumstances surrounding the giving of the mortgage, and the subsequent dealing in the property with the knowledge and assent of the mortgagee, may be shown, and they may be sufficient to justify the court or jury in inferring the agreement; and so the parol agreement was inferred in all the cases which have come under our observation."

§ 351. **Comments in the cases.**—Chief-Justice Parker, in speaking of these shifting liens, observes that "if this doctrine were admitted, a mortgage of personal property would be like a kaleidoscope, in that the forms represented would change at every turn; but, unlike that instrument, in that the materials would not remain the same."[1] The objection may be re-stated, to the effect that the mortgagor may dis-

[1] Ranlett v. Blodgett, 17 N. H. 305.

pose of the property, defeat the mortgage, and put the money in his own pocket; but if he refuses to pay a debt, and creditors seize the property in execution against his will, the mortgage steps in and restores it to the debtor.[1] Again, it is said that there is no specific lien, but "a floating mortgage, which attaches, swells, and contracts, as the stock in trade changes, increases, and diminishes; or may wholly expire by entire sale and disposition, at the will of the mortgagor."[2] Such stipulations are not only inconsistent with the idea of a mortgage, but tend inevitably to give a fraudulent advantage to the debtor over his other creditors.[3]

§ 352. **Opposing rule and cases.**—The rule embodied in Robinson v. Elliott[4] has, however, been a subject of much discussion and dissension. It seems to be conceded in the great mass of the cases, that an agreement for the retention of possession, with power of disposition by the mortgagor, may constitute evidence of fraud, proper to be considered by the jury or the court, as a fact in connection with all the circumstances arising in each particular case. The contention against the rule in Robinson v. Elliott is that the agreement does not render the instrument void *per se*, or as matter of law, or conclusively fraudulent, and that whether it is fraudulent in *fact* or not, should be "decided upon all the evidence, including, of course, the terms of the instrument itself."[5]

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[1] Collins v. Myers, 16 Ohio 547.

[2] Collins v. Myers, 16 Ohio 554.

[3] Tennessee Nat. Bank v. Ebbert, 9 Heisk. (Tenn.) 153.

[4] 22 Wall. 513. See Means v. Dowd, 128 U. S. 284.

[5] Hughes v. Cory, 20 Iowa 399–410, per Dillon, J.; Brett v. Carter, 2 Lowell 458; Gay v. Bidwell, 7 Mich. 519; Googins v. Gilmore, 47 Me. 9; Clark v. Hyman, 55 Iowa 14; Fletcher v. Powers, 131 Mass. 333; Briggs v. Parkman, 2 Met. (Mass.) 258; Jones v. Huggeford, 3 Met. (Mass.) 515; Hunter v. Corbett, 7 U. C. Q. B. 75; Miller *ads.* Pancoast, 29 N. J. Law 250; Price v. Mazange, 31 Ala. 701; Sleeper v. Chapman, 121 Mass. 404; People v. Bristol, 35 Mich. 28; Wingler v. Sibley, 35 Mich. 231; Hedman v. Anderson, 6 Neb. 392; Cheatham v. Hawkins, 76 N. C. 335; Mitchell v. Winslow,

§ 353. — Lowell, J.,[1] seemed "to doubt both the generality and the justice" of the rule stated by Davis, J., in Robinson v. Elliott,[2] and regarded the doctrine as substantially settled, that when a vendor or mortgagor was permitted to retain the possession and control of his goods and act as apparent owner, the question whether this was a fraud or not was one of fact for the jury. The court observed: "A conveyance for a valuable present consideration is never a fraud in law on the face of the deed, and if fraud is alleged to exist, it must be proved as a fact." It is considered plain that the doctrine of Robinson v. Elliott "virtually prevents a trader from mortgaging his stock at any time for any useful purpose; for if he cannot sell in the ordinary course of trade, or only as the trustee and agent of the mortgagee, he might as well give possession to the mortgagee at once and go out of business."

It is to be noticed that the court by this sentence expresses the belief that shifting liens upon merchandise, which open and close at the will of the mortgagor, are not necessarily fraudulent contrivances devised to defeat creditors; on the contrary, such mortgages seem to be contemplated as capable of subserving a "useful purpose." Many of the cases, however, which follow Brett v. Carter, in holding that fraud is a question of fact, concede, and often expressly state, that contrivances of this class are convenient covers for fraud upon creditors. It seems to have been admitted in Brett v. Carter,[3] that there was no fraud

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2 Story 647; Miller v. Jones, 15 N. B. R. 150; Barron v. Morris, 14 N. B. R. 371; Frankhouser v. Ellett, 22 Kan. 127; S. C. 31 Am. Rep. 171; Williams v. Winsor, 12 R. I. 9. See S. C. 17 Alb. L. J. 359, and cases cited. It may be observed that Dillon, J., adopted the other rule when sitting as a circuit judge. He said: "A conveyance of personal property to secure creditors, when the grantor, by the understanding of the parties, expressed or implied, is to remain in possession of the property, with a power of sale, is void upon a principle of public policy embodied in the State, irrespective of any question of actual and intended fraud." *Re* Kirkbride, 5 Dill. 117.

[1] Brett v. Carter, 2 Lowell 458.

[2] 22 Wall. 513.

[3] 2 Low. 458.

in fact as it is commonly termed; that the transaction showed that all the stock, present and future, was hypothecated to the payment of a certain debt by instalments. "No offer is made," said Lowell, J., "to prove that any one was deceived, or even was ignorant of the mortgage; but I am asked to find fraud in law, when I know, and it is admitted, there was none in fact." The court cites Mr. May's treatise as authority for the statement that fraud is a question of fact,[1] but omits to note that the learned author was on the page cited discussing the question of the effect of the simple retention of possession, and fails to notice the following observation:[2] "The rule seems to be that where there is an absolute conveyance, and the grantor remains in possession *in such a way as to be able to use the goods as his own*, it is always void against creditors, even though made on valuable consideration."[3]

§ 354. **Discussion of the principle involved.**—It is foreign to our design to kindle the smouldering embers of this discussion into new flame. It will be seen at a glance that the subject-matter of contention in the controversy is the much-debated distinction between fraud in law and fraud in fact. The conclusion is reached in our opening chapter,[4] that this distinction is largely mythical, and relates only to the character and quantity of the proof adduced to nullify the transaction. Where the evidence is of such a conclusive nature that the fraudulent intent unmistakably fastens its fangs upon the transfer, so that a verdict or finding contrary to the evident evil design so established would be erroneous, the court pronounces the transaction covinous, and imputes the fraudulent intent to the parties in obedience to the principle of law that they must have contemplated the natural and necessary consequences of their

[1] May on Fraudulent Conveyances, p. 106.

[2] Ibid., p. 100.

[3] See Pierce on Fraudulent Mortgages of Merchandise, § 123.

[4] See §§ 9, 10.

acts. Where the facts are not controverted and do not admit of a construction consistent with innocence, surely the burden is cast upon the court to declare the result. There is no question of intention to be submitted to the jury. As the mortgage shows upon its face that it was not designed by the parties as an operative instrument between them, its only effect is to prejudice others. The court should "pronounce it void, for the reason that the evidence conclusively shows it fraudulent."[1] It is because such trusts are calculated to deceive and embarrass creditors, because they are not things to which honest debtors can have occasion to resort in sales of their property, and because they constitute the means which dishonest debtors commonly and ordinarily use to cheat their creditors, that the law does not permit a debtor to say that he used them for an honest purpose in any case.[2] Chief-Justice Ryan said: "Intent does not enter into the question. Fraud in fact goes to avoid an instrument otherwise valid. But intent, *bona fide* or *mala fide*, is immaterial to an instrument *per se* fraudulent and void in law. The fraud which the law imputes to it is conclusive. . . . . Fraud in fact imputed to a contract (valid on its face) is a question of evidence; not fraud in law. And no agreement of the parties in parol can aid a written instrument fraudulent and void in law."[3]

§ 355. **Authorizing sales for mortgagee's benefit.**—Three cases,[4] decided in the New York Court of Appeals in rapid succession, and recently approved in the same court,[5] held that a chattel mortgage was not *per se* void because of a provision contained in it allowing the mortgagor to sell the mortgaged property and account to the mortgagee for the

[1] Russell v. Winne, 37 N. Y. 595.
[2] Coolidge v. Melvin, 42 N. H. 520; Winkley v. Hill, 9 N. H. 31.
[3] Blakeslee v. Rossman, 43 Wis. 124.
[4] Ford v. Williams, 24 N. Y. 359; Conkling v. Shelley, 28 N. Y. 360; Miller v. Lockwood, 32 N. Y. 293.
[5] Brackett v. Harvey, 91 N. Y. 221. See Hawkins v. Hastings Bank, 1 Dillon 462.

proceeds, and apply them to the mortgage debt. "These cases," says Finch, J., "went upon the ground that such sale and application of proceeds is the normal and proper purpose of a chattel mortgage, and within the precise boundaries of its lawful operation and effect. It does no more than to substitute the mortgagor as the agent of the mortgagee, to do exactly what the latter had the right to do, and what it was his privilege and his duty to accomplish."[1] It may be observed that a subsequent judgment-creditor is entitled to have an account of the sales so made stated, and to have the amount thereof applied to reduce the mortgage debt.[2]

§ 356. Sales upon credit.—The rule being established that the mortgagor may sell the property and account for the proceeds to the mortgagee, and that such an arrangement is not fraudulent in law if made with an honest intention,[3] another phase of the controversy must be considered. What will be the effect if the mortgagor is not restricted to sales for cash, but is allowed to sell upon credit, in his discretion? Elsewhere it is shown that general assignments permitting the assignee to sell upon credit are regarded as fraudulent, because such agreements hinder and delay creditors and prevent the immediate application of the debtor's property to the payment of their claims.[4] The same principle has been extended and applied to sales of the mortgaged property made upon credit by the mortgagor for the mortgagee. The arrangement is calculated to keep the creditors at bay, and is regarded as fraudulent

[1] Brackett v. Harvey, 91 N. Y. 221; S. P. Wilson v. Sullivan, 58 N. H. 260; Hawkins v. Hastings Bank, 1 Dillon 462; Overman v. Quick, 8 Biss. 134; Abbott v. Goodwin, 20 Me. 408; Crow v. Red River Co. Bank, 52 Tex. 362.

[2] Ellsworth v. Phelps, 30 Hun (N. Y.) 646.

[3] Ford v. Williams, 24 N. Y. 359; Brackett v. Harvey, 91 N. Y. 221; Hawkins v. Hastings Bank, 1 Dill. 462.

[4] Nicholson v. Leavitt, 6 N. Y. 510; Barney v. Griffin, 2 N. Y. 365; Dunham v. Waterman, 17 N. Y. 21. See §§ 332, 333.

per se.[1] If, however, the accounts, where the sales are effected on credit, are immediately transferred to the mortgagee at their face, and credited or allowed upon the mortgage debt, the objectionable elements of the transaction are eliminated, and the arrangement will be tolerated.[2] In Brown v. Guthrie,[3] Finch, J., said: "The dealing, therefore, must be treated as a chattel mortgage by the debtor to his creditor, the consideration of which was evidenced and settled by the outside agreement. So regarded, the findings declare it to have been in good faith and not fraudulent. The arrangement for the sale on credit was made harmless by the stipulation that Guthrie should take the credits as cash, and himself bear the delay, and risk the solvency of the purchasers."[4]

§ 357. **Possession—Independent valid transactions.**—Selling or taking possession of the property under and by virtue of the fraudulent mortgage cannot, of necessity, purge it of the vice of fraud.[5] The title remained fraudulent and voidable still as against creditors.[6] Before and after taking possession, the title of the mortgagee rests equally upon the mortgage, and the question, as regards creditors of the mortgagor, is the validity of his paper title. The mortgagee's possession under the mortgage is as good or as bad as the mortgage itself, and the court has not the power to

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[1] City Bank v. Westbury, 16 Hun (N. Y.) 458.

[2] Caring v. Richmond, 22 Hun (N. Y.) 370.

[3] 110 N. Y. 435, 443.

[4] Citing Brackett v. Harvey, 91 N. Y. 214.

[5] In Wells v. Langbein, 20 Fed. Rep. 183, 186, the court observe: "The Supreme Court of California, in Chenery v. Palmer, 6 Cal. 123; the Supreme Court of New York, in Delaware v. Ensign, 21 Barb. (N. Y.) 85, and Dutcher v. Swartwood, 15 Hun (N. Y.) 31; the Court of Appeals of New York, in Parshall v. Eggert, 54 N. Y. 18; the Supreme Court of Wisconsin, in Blakeslee v. Rossman, 43 Wis. 116, and the Supreme Court of Minnesota, in Stein v. Munch, 24 Minn. 390,—all hold that where the mortgage is void for fraud as to creditors, taking possession thereunder, before a lien is obtained on the property in favor of a creditor, will not render it valid. The fraud existing in the mortgage itself vitiates all steps taken under it."

[6] Smith v. Ely, 10 N. B. R. 563.

transmute a void mortgage into a valid pledge.[1] But even in cases where the mortgage is fraudulent, if the mortgagee repudiates the instrument and casts it aside, and obtains a pledge of the goods, accompanied by delivery and an open change of possession, and by a distinct agreement subsequent to and independent of the mortgage, his rights will be protected as against the other creditors.[2]

§ 358. **Right of revocation—Reservations.**—We have seen that a debtor, before any lien attaches in favor of creditors, possesses the right to make any disposition of his property.[3] The contract, however, by which he parts with it must be absolute and unconditional, for if he retain the right to revoke the contract and resume the ownership of the property, the reservation is considered as inconsistent with a fair, honest, and absolute sale, and renders the transfer fraudulent and void.[4] In the great case of Riggs v. Murray,[5] in which the various instruments of transfer contained powers of revocation, Chancellor Kent held the transfers void, saying that there was a necessary inference of a purpose to "delay, hinder, or defraud creditors," that the only effect of these assignments was "to mask the property"; and that such powers of revocation are fatal to the instrument and poison it throughout, appears to have been well established by authority.[6] So a deed reserving the right to the grantor to sell and convey the property without the consent of the grantee, is incon-

[1] Blakeslee v. Rossman, 43 Wis. 127. See Robinson v. Elliott, 22 Wall. 513; Dutcher v. Swartwood, 15 Hun (N. Y.) 31; Stimson v. Wrigley, 86 N. Y. 332; *In re* Forbes, 5 Biss. 510; Janvrin v. Fogg, 49 N. H. 340; Wells v. Langbein, 20 Fed. Rep. 183, 186. But compare Baldwin v. Flash, 59 Miss. 66, and cases cited.

[2] Pettee v. Dustin, 58 N. H. 309; Brown v. Platt, 8 Bosw. (N. Y.) 324; First Nat. Bank v. Anderson, 24 Minn. 435; Baldwin v. Flash, 58 Miss. 593.

[3] See § 52.

[4] West v. Snodgrass, 17 Ala. 554.

[5] 2 Johns. (N. Y.) 565. But see Murray v. Riggs, 15 Johns. (N. Y.) 571.

[6] Compare Smith v. Conkwright, 28 Minn. 23; Shannon v. Commonwealth, 8 S. & R. (Pa.) 444; The King v. Earl of Nottingham, Lane 42; Smith v. Hurst, 10 Hare 30.

sistent with the idea of a sale, and may be avoided by creditors.[1]

§ 359. **Rule as to consumable property.**—The mortgaging of property, the use of which involves its consumption, is an evidence of fraud of much weight. Unless satisfactorily explained it will cause the condemnation of the instrument.[2] Of course articles in their nature subject to be consumed in their use may be mortgaged without any imputation of fraud, provided they are not to be used, and may be kept without damage until the mortgage debt shall become payable.[3] If, however, the mortgage covers articles which would perish or be destroyed before the debts secured by the mortgage mature, it becomes manifest that the object was not to apply these things to the payment of the mortgage, but to secure the debtor in their possession and enjoyment.[4]

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[1] Fisher v. Henderson, 8 N. B. R. 175. Compare Henderson v. Downing, 24 Miss. 106; Coolidge v. Melvin, 42 N. H. 510; Donovan v. Dunning, 69 Mo. 436; Lukins v. Aird, 6 Wall. 78. See May on Fraudulent Conveyances, 93, 94. See § 11, and cases cited.

[2] Farmers' Bank v. Douglass, 19 Miss. 540; Brockenbrough v. Brockenbrough, 31 Gratt. (Va.) 590; Sommerville v. Horton, 4 Yerg. (Tenn.) 550; Shurtleff v. Willard, 19 Pick. (Mass.) 202; Robbins v. Parker, 3 Met. (Mass.) 120. See Googins v. Gilmore, 47 Me. 14; Putnam v. Osgood, 51 N. H. 200.

[3] Robbins v. Parker, 3 Met. (Mass.) 120. Compare Miller v. Jones, 15 N. B. R. 154.

[4] Farmers' Bank v. Douglass, 19 Miss. 541. See Quarles v. Kerr, 14 Gratt. (Va.) 48.

CHAPTER XXIII.

SPENDTHRIFT TRUSTS.

§ 360. Aversion to exemptions other than statutory.
361. Restraints upon alienation.
362. } Repugnant conditions.
363. }
364. Nichols v. Eaton; the point actually involved.
§ 365. The *dictum* in Nichols v. Eaton.
366. The correct rule.
367. Broadway Bank v. Adams.
368. Spendthrift trusts in Pennsylvania.

"It is a settled rule of law that the beneficial interest of the *cestui que trust*, whatever it may be, is liable for the payment of his debts. It cannot be so fenced about by inhibitions and restrictions as to secure to it the inconsistent characteristics of right and enjoyment to the beneficiary and immunity from his creditors."—Mr. Justice Swayne in *Nichols* v. *Levy*, 5 Wall. 441.

§ 360. Aversion to exemptions not statutory.—Aside from statutory exemptions trivial in amount,[1] the idea of the existence of rights of property of any kind in a debtor, which cannot be reached by creditors and applied toward the satisfaction of debts, is abhorrent to modern convictions of justice toward the creditor class. The personal liberty of the debtor being no longer in danger, there exists no controlling check upon his recklessness and improvidence.[2] This is the source of the strong tendency, manifested in the courts, to strengthen, enlarge, and perfect the creditors' remedies and recourses against the property and interests of the debtor class. The plain purpose manifested in our modern law in extending relief to creditors, is twofold: first, to enforce the creditors' equitable lien upon the debtor's property considered as a trust fund;[3] and second, to inflict a species of negative punishment

[1] See §§ 46–50, 365.
[2] See § 2.
[3] See Egery v. Johnson, 70 Me. 258; Seymour v. Wilson, 19 N. Y. 418.

upon the debtor by depriving him of the personal comforts and enjoyments which result from the possession and use of property or accumulated wealth. There can be no spectacle more revolting to the mass of mankind, and especially in a community such as ours, than that of a bankrupt or insolvent revelling in luxury. It is opposed to a wise public policy that a man "should have an estate to live on, but not an estate to pay his debts with,"[1] or that he should possess "the benefits of wealth without the responsibilities."[2] Chief-Justice Denio said: "It is against general principles that one should hold property, or a beneficial interest in property, by such a title that creditors cannot touch it."[3]

The feelings of the general community were shocked at the *dictum* of Wright, J., in Campbell v. Foster,[4] to the effect that the surplus of a trust fund created by a third party, for the benefit of the debtor, was not available to his creditors. The more recent opinion of Rapallo, J., in Williams v. Thorn,[5] holding that, whether the trust relate to realty or personalty, the surplus income of such an estate beyond what was needed for the suitable support and maintenance of the *cestui que trust* and those dependent upon him, could be reached by a creditors' bill, was greeted with satisfaction. An effort, however, has been made to close

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[1] Tillinghast v. Bradford, 5 R. I. 205, 212.

[2] Gray on Restraints on Alienation, p. 169.

[3] Rome Exchange Bank v. Eames, 4 Abb. App. Dec. (N. Y.) 83, 99. "That grown men should be kept all their lives in pupilage, that men not paying their debts should live in luxury on inherited wealth, are doctrines as undemocratic as can well be conceived. They are suited to the times in which the Statute De Donis was enacted, and the law was administered in the interest of rich and powerful families. The general introduction of spendthrift trusts would be to form a privileged class, who could indulge in every speculation, could practice every fraud, and, provided they kept on the safe side of the criminal law, could yet roll in wealth. They would be an aristocracy, though certainly the most contemptible aristocracy with which a country was ever cursed." Gray on Restraints on Alienation, p. 174.

[4] 35 N. Y. 361. See § 45.

[5] 70 N. Y. 270. See Arzbacher v. Mayer, 53 Wis. 391.

another source of possible relief to creditors, by the class of cases already referred to,[1] and which will presently be considered more at length. First, however, we will glance at the authorities which discuss the rights of the parties in cases where property has been conveyed with a restraint imposed upon its alienation, or an attempt has been made to vest it in the grantee without subjecting it to liability to his creditors.

§ 361. **Restraints upon alienation.**—The theory of the law is that no person shall be permitted to enjoy or hold any interest in property to which the incidents of ownership, *i. e.*, the right of alienation and liability to the claims and remedies of creditors, do not attach.[2] A condition or proviso in a grant or devise, that the land shall not be subject to alienation, attachment, or levy, is treated as void.[3] The policy of the law will not permit property to be so limited

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[1] See § 45, and note.

[2] See Chap. II.

[3] Blackstone Bank v. Davis, 21 Pick. (Mass.) 42; McCleary v. Ellis, 54 Iowa 311; S. C. 20 Am. Law Reg. N. S. 180; and the learned note by Henry Wade Rogers, Esq., at page 185, reviewing the authorities. Prof. Gray says (Gray's Restraints on Alienation), p. 12: "As in England, so in America, a condition, or a conditional limitation, restraining the owner in fee simple from selling his land, is bad. Henning v. Harrison, 13 Bush (Ky.) 723; Smith v. Clark, 10 Md. 186; Gleason v. Fayerweather, 4 Gray (Mass.) 348; Campau v. Chene, 1 Mich. 400; McDowell v. Brown, 21 Mo. 57; Pardue v. Givens, 1 Jones' Eq. (N. C.) 306; Schermerhorn v. Negus, 1 Denio (N. Y.) 448; Lovett v. Kingsland, 44 Barb. (N. Y.) 560; S. C. *sub nom.* Lovett v. Gillender, 35 N. Y. 617; Walker v. Vincent, 19 Pa. St. 369; Williams v. Leech, 28 Pa. St. 89; Naglee's Appeal, 33 Pa. St. 89; Jauretche v. Proctor, 48 Pa. St. 466; Kepple's Appeal, 53 Pa. St. 211; Lario v. Walker, 28 Grant (Ont.) 216. These cases are decisions directly in point, and *dicta* to the same effect are found in abundance, *e. g.*, in Taylor v. Mason, 9 Wheat. 325, 350; McDonogh v. Murdoch, 15 How. 367, 412; Andrews v. Spurlin, 35 Ind. 262, 268; Deering v. Tucker, 55 Me. 284, 289; Hawley v. Northampton, 8 Mass. 3, 37; Gray v. Blanchard, 8 Pick. (Mass.) 284, 289; Van Rensselaer v. Dennison, 35 N. Y. 393; Turner v. Fowler, 10 Watts (Pa.) 325; Reifsnyder v. Hunter, 19 Pa. St. 41; Doebler's Appeal, 64 Pa. St. 9; Grant v. Carpenter, 8 R. I. 36; Doe *d.* McIntyre v. McIntyre, 7 U. C. Q. B. 156; McMaster v. Morrison, 14 Grant (Ont.) 138, 141; Crawford v. Lundy, 23 Grant (Ont.) 244, 250; Fulton v. Fulton, 24 Grant (Ont.) 422. See Dehorty v. Jones, 2 Harr. (Del.) 56, note; Newkerk v. Newkerk, 2 Cai. (N. Y.) 345."

as to remain in a party for life, free from the incidents of property, and not subject to his debts.[1]

§ 362. **Repugnant conditions.**—Restraints upon either voluntary or involuntary alienation are not favored in the law, and are defeated upon another ground. In De Peyster v. Michael,[2] after a careful review of the authorities, the New York Court of Appeals observed: "Upon the highest legal authority, therefore, it may be affirmed that in a fee-simple grant of land, a condition that the grantee shall not alien, or that he shall pay a sum of money to the grantor upon alienation, is void, on the ground that it is repugnant to the estate granted." So in Bradley v. Peixoto,[3] the court say that it is "laid down as a rule long ago established, that where there is a gift with a condition inconsistent with, and repugnant to such gift, the condition is wholly void. A condition that tenant in fee shall not alien is repugnant."[4] In Mandlebaum v. McDonell[5] will be found an elaborate review of the cases and an exhaustive consideration of the question. The court conclude that the only safe rule of decision is that which prevailed at common law for ages, to the effect that "a condition or restriction which would suspend all power of alienation for a single day, is inconsistent with the estate granted, unreasonable, and void." In Blackstone Bank v. Davis,[6] a leading and important case, it appeared that one Davis devised to his son the use of a farm of one hundred and twenty acres, with a provision that the land should not be subject or liable to conveyance or attachment. The plaintiffs recovered a judgment against the devisee and levied an execution upon the premises as being land held by the defendant in fee. The court said: "By the devise of the profits, use, or occu-

[1] 4 Kent's Com., p. 311.
[2] 6 N. Y. 467, 497.
[3] 3 Ves. Jr. 324.
[4] See Brandon v. Robinson, 18 Ves. Jr. 429; McCullough v. Gilmore, 11 Pa. St. 370.
[5] 29 Mich. 78, 107.
[6] 21 Pick. (Mass.) 42.

pation of land, the land itself is devised. Whether the defendant took an estate in fee or for life only, is a question not material in the present case. The sole question is, whether the estate in his hands was liable to attachment and to be taken in execution as his property. The plaintiffs claim title under the levy of an execution against the defendant, and their title is valid if the estate was liable to be so taken. That it was so liable, notwithstanding the proviso or condition in the will, the court cannot entertain a doubt."

§ 363. — In Walker v. Vincent[1] the testator devised certain real estate to his daughter and to her legal heirs forever, upon the express condition that she should "not alien or dispose of the same, or join in any deed or conveyance with her husband for the transfer thereof, during her natural life." The court held the condition void, and that a fee-simple estate was devised, and said: "It makes no difference that the testator has expressly withheld one of the rights essential to a fee-simple, for the law does not allow an estate to be granted to a man and his heirs, with a restraint on alienation, and frustrates the most clear intention to impose such a restraint, just as it allows alienation of an estate tail, though a contrary intent is manifest. And it would be exceedingly improper, in any court, in construing a devise to a man and his heirs, to endeavor to give effect to the restraint upon alienation by changing the character of the estate to a life estate, with a remainder annexed to it, or with an executory devise over."[2] In Hall v. Tufts[3] the testator devised certain real estate to his wife for her life, and "the remainder of his estate, whether real or personal, in possession or reversion, to his

[1] 19 Pa. St. 369.

[2] *Restraints upon personalty.* — A condition against alienation cannot be imposed upon an absolute interest in personalty. Lovett v. Kingsland, 44 Barb. (N. Y.) 560, affi'd *sub nom.* Lovett v. Gillender, 35 N. Y. 67; Barker v. Davis, 12 U. C. C. P. 344.

[3] 18 Pick. (Mass.) 455.

five children, to be equally divided to and among them, or their heirs, respectively, always intending and meaning that none of his children shall dispose of their part of the real estate in reversion before it is legally assigned them." The court held that the children took a vested remainder in the real estate given to the wife for her life, and that the clause restraining them from alienating it before the expiration of the life estate was void.[1]

§ 364. **Nichols v. Eaton; the point actually involved.**—The principle embodied in Nichols v. Eaton,[2] and more especially the language employed by Miller, J., in delivering the opinion of the Supreme Court in that case, have provoked extended discussion and sharp criticism.[3] The importance of the case seems to call for an extended statement of the facts involved. It appeared that property had been devised to trustees with directions to pay the income to the children of the testatrix in equal shares, and on the death of each child, his or her share was to go over. If the sons respectively should alienate, or by reason of bankruptcy or insolvency, or any other cause, the income could no longer be personally enjoyed by them respectively, but

[1] "Repugnant conditions are those which tend to the utter subversion of the estate, such as prohibit entirely the alienation or use of the property. Conditions which prohibit its alienation to particular persons or for a limited period, or its subjection to particular uses, are not subversive of the estate; they do not destroy or limit its alienable or inheritable character." Field, J., in Cowell v. Springs Co., 100 U.S. 57, citing Sheppard's Touchstone, 129, 131.

[2] 91 U. S. 716.

[3] This decision called forth an essay by Professor Gray, already cited, entitled Restraints on the Alienation of Property. These sentences may be found in the preface: "How far the law will allow a man to enjoy rights in property which he cannot transfer, and which his creditors cannot take for their debts, is a question becoming more and more frequent in this country. In 1876 I shared the surprise, common to many lawyers, at the opinion of the Supreme Court of the United States, in the case of Nichols v. Eaton, 91 U. S. 716, containing, as it did, much that was contrary to what, both in teaching and practice, I had hitherto supposed to be settled law." The preface adds that the book was substantially written before the decision of the Supreme Judicial Court of Massachusetts in Broadway Nat. Bank v. Adams, 133 Mass. 170. See *infra*, § 367.

would become vested in and payable to some other person, then the trust as to such portion so divested should immediately cease and determine. In that event, during the residue of the life of such son, the income was to be paid to his wife or child, and in default of such persons, to be added to the principal, and further, "in case, after the cessation of said income as to my said sons respectively, otherwise than by death, as hereinbefore provided for, it shall be lawful for my said trustees, in their discretion, but without its being obligatory upon them, to pay to or apply for the use of my said sons respectively, or for the use of such of my said sons and his wife and family, so much and such part of the income to which my said sons respectively would have been entitled under the preceding trusts, in case the forfeiture hereinbefore provided for had not happened." One of the sons became a bankrupt, and his assignee in bankruptcy brought a bill against the trustees to have the income of the son's share applied for the benefit of creditors.[1]

Mr. Justice Miller, in the opening sentences of his opinion, observes that the claim of the assignee is founded on the proposition "that a will which expresses a purpose to vest in a devisee either personal property, or the income of personal or real property, and secure to him its enjoyment free from liability for his debts, is void on grounds of

[1] *Nichols v. Eaton, re-stated.*—In Hyde v. Woods, 94 U. S. 526, Mr. Justice Miller takes occasion to observe that his own opinion in Nichols v. Eaton, 91 U. S. 716, "was well considered," and says: "In that case, the mother of the bankrupt Eaton, had bequeathed to him by will the income of a fund, with a condition in the trust that on his bankruptcy or insolvency the legacy should cease and go to his wife or children, if he had any, and if not, it should lapse into the general fund of the testator's estate, and be subject to other dispositions. The assignee of the bankrupt sued to recover the interest bequeathed to the bankrupt, on the ground that this condition was void as against public policy. But this court, on a full examination of the authorities, both in England and this country, held that the objection was not well taken; that the owner of property might make such a condition in the transfer of that which was his own, and in doing so violated no creditor's rights and no principle of public policy."

public policy, as being in fraud of the rights of creditors; or as expressed by Lord Eldon in Brandon v. Robinson:[1] 'If property is given to a man for his life, the donor cannot take away the incidents to a life estate.'" "There are two propositions," continues the learned judge, "to be considered as arising on the face of this will as applicable to the facts stated: (1) Does the true construction of the will bring it within that class of cases, the provisions of which on this point are void under the principle above stated? and (2), If so, is that principle to be the guide of a court of the United States sitting in chancery?" After reviewing the English authorities, the opinion continues: "Conceding to its fullest extent the doctrine of the English courts, their decisions are all founded on the proposition that there is somewhere in the instrument which creates the trust a substantial right, a right which the appropriate court would enforce, left in the bankrupt after his insolvency, and after the cesser of the original and more absolute interest conferred by the earlier clauses of the will. This constitutes the dividing line in the cases which are apparently in conflict. Applying this test to the will before us, it falls short, in our opinion, of conferring any such right on the bankrupt. Neither of the clauses of the provisos contain anything more than a grant to the trustees of the purest discretion to exercise their power in favor of testatrix's sons. It would be a sufficient answer to any attempt on the part of the son in any court to enforce the exercise of that discretion in his favor, that the testatrix has in express terms said that such exercise of this discretion is not 'in any manner obligatory upon them,'—words repeated in both these clauses. To compel them to pay any of this income to a son after bankruptcy, or to his assignee, is to make a will for the testatrix which she never made; and to do it by a decree of a court is to substitute the discretion

[1] 18 Ves. 433.

of the chancellor for the discretion of the trustees, in whom alone she reposed it." Thus far we cannot but consider the case as correctly reasoned and decided, since a gift of a life estate or interest, with a proviso that it shall go over to a third person upon alienation, voluntary or involuntary, by the life tenant, is considered valid. We can formulate no well-founded objection to such a transaction. Probably the earliest case in which the point is so held is Lockyer v. Savage,[1] decided in 1773, but the question seems now to be no longer a matter of dispute.[2]

§ 365. **The dictum in Nichols v. Eaton.**—The court, however, seemed disinclined to limit the discussion to the questions before it. Referring to the implication in the remark of Lord Eldon, already quoted, the court were unable to see that the power of alienation was a *necessary* incident to a life estate in real property, or that the rents and profits of real property, and the interest and dividends of personal property, might not be enjoyed by an individual without

[1] 2 Stra. 947.

[2] Shee v. Hale, 13 Ves. Jr. 404; Cooper v. Wyatt, 5 Madd. 482; Martin v. Margham, 14 Sim. 230; Rochford v. Hackman, 9 Hare 475; Brandon v. Aston, 2 Y. & C. N. R. 24; *Re* Edgington's Trusts, 3 Drew 202; Manning v. Chambers, 1 De G. & Sm. 282; Carter v. Carter, 3 Kay & J. 617; Barnett v. Blake, 2 Dr. & Sm. 117; *Re* Muggeridge's Trusts, Johnson, 625; Sharp v. Cosserat, 20 Beav. 470; Haswell v. Haswell, 28 Beav. 26; Dorsett v. Dorsett, 30 Beav. 256; Townsend v. Early, 34 Beav. 23; Freeman v. Bowen, 35 Beav. 17; Montefiore v. Behrens, 35 Beav. 95; Oldham v. Oldham, L. R. 3 Eq. 404; Roffey v. Bent, L. R. 3 Eq. 759; Craven v. Brady, L. R. 4 Eq. 209; S. C. L. R. 4 Ch. App. 296; *In re* Amherst's Trusts, L. R. 13 Eq. 464; Billson v. Crofts, L. R. 15 Eq. 314; *Ex parte* Eyston, 7 Ch. D. 145; Caulfield v. Maguire, 5 Ir. Ch. 78; Nichols v. Eaton, 91 U. S. 716; Bramhall v. Ferris, 14 N. Y. 41; Emery v. Van Syckel, 17 N. J. Eq. 564, cited in Gray's Restraints on Alienation, § 78. Where a man settled his property upon himself for life, or until he should become a bankrupt or insolvent, and after his death, bankruptcy or insolvency, in trust for his wife and children, and the settlor being insolvent assigned his property to trustees for the benefit of creditors, it was held that the trust was void as against the assignee. *In re* Casey's Trusts, 4 Irish Ch. 247. A bond payable to trustees for the benefit of a wife on bankruptcy of the obligor is not good. *Ex parte* Hill, 1 Cooke's Bkr. Law 228; *Ex parte* Bennet, 1 Cooke's Bkr. Law 228; *In re* Murphy, 1 Sch. & Lef. 44; *Ex parte* Taaffe, 1 Glyn & J. 110.

liability for his debts attaching as a necessary incident to such enjoyment. The opinion continues: "Nor do we see any reason, in the recognized nature and tenure of property and its transfer by will, why a testator who *gives*, who gives without any pecuniary return, who gets nothing of property value from the donee, may not attach to that gift the incident of continued use, of uninterrupted benefit of the gift, during the life of the donee. Why a parent, or one who loves another, and wishes to use his own property in securing the object of his affection, as far as property can do it, from the ills of life, the vicissitudes of fortune, and even his own improvidence, or incapacity for self-protection, should not be permitted to do so, is not readily perceived." The cases cited in support of the views of the court[1] are chiefly from Pennsylvania,[2] and unfortunately, as we think, close with the well-known New York case of Campbell v. Foster.[3] This case, as we have already seen,[4] contains a *dictum* to the effect that the interest of a beneficiary in a trust fund created by a person other than the debtor is not available to creditors, but, as heretofore shown,[5] this *dictum* is expressly repudiated by Rapallo, J., in delivering the opinion of the New York Court of Appeals in Williams v. Thorn,[6] and the principle in support of which the case is cited in Nichols v. Eaton is proved never to have been the law of that State.

Nichols v. Eaton embodies a dangerous and startling *dictum*. If the question whether or not it was permissible,

[1] Leavitt v. Beirne, 21 Conn. 1; Nickell v. Handly, 10 Gratt. (Va.) 336; Pope's Ex'rs v. Elliott, 8 B. Mon. (Ky.) 56.

[2] Fisher v. Taylor, 2 Rawle (Pa.) 33; Holdship v. Patterson, 7 Watts (Pa.) 547; Shankland's Appeal, 47 Pa. St. 113; Ashhurst v. Given, 5 W. & S. (Pa.) 323; Brown v. Wiliamson, 36 Pa. St. 338; Still v. Spear, 45 Pa. St. 168. See § 368.

[3] 35 N. Y. 361. See Cutting v. Cutting, 86 N. Y. 546.

[4] See §§ 45, 360.

[5] See §§ 45, 360.

[6] 70 N. Y. 270. See Tollis v. Wood, 99 N. Y. 616; s. c. 16 Abb. N. C. (N. Y.) 1, and the collection of cases in the notes. Parties interested in this class of litigation are referred to this valuable source of information.

aside from the rules of law establishing the tenure by which property is held and transferred, to allow a debtor to enjoy an interest in property free from the claims of creditors, were an open one, we should certainly answer that such a policy was neither judicious, safe, nor wise.[1] This conclusion is not necessarily rested wholly upon the theory that such a vesting of property in a debtor is a fraud upon creditors, but rather that property, by the rules of law, includes not only the right of enjoyment, but also the right of alienation and liability for debts. While it is true that the owner of property may, while he owns it, use it as he likes, yet he should not be permitted to limit or control its use after he parts with it.[2] These trust estates and incomes are in the opinion likened to statutory exemptions; the analogy is considered perfect; the creditor, it is said, has no right to look to either of these sources for satisfaction of his claim. We challenge the justness of the analogy and question the correctness of the rule sought to be formulated from it. Statutory exemptions are trivial in value; they do not clothe the debtor with *indicia* of wealth, or furnish him with comforts or luxuries. It would be inhumane to permit the creditor to take the insolvent's clothing from his back, the food from his table, or the bed from his house. It is equally against a wise public policy to deprive the professional man of his library, the mechanic of his tools, or the teamster of his horses, for by so doing the insolvent would be pauperized and perhaps rendered a public charge, and the possibility of repairing his ill-fortune by future industry irretrievably lost. These exemption statutes so universal in their operation reflect the charitable sentiments of a noble and generous people, and exhibit a willingness on the part of the law-makers to extend a protecting hand to unfortunate struggling insolvents. We deny that the kindly spirit which inspired this humane legislation can be

[1] See § 360.

[2] See 10 Am. Law Rev. 595.

tortured or perverted so as to subserve the purpose of shielding vagabond spendthrifts from the remedies of their creditors.[1]

§ 366. **The correct rule.**—The true rule should be that "whatever a man can demand from his trustees, that his creditors can demand from him."[2] In Tillinghast v. Bradford[3] it appeared that the devise was to T. in trust to pay the income to H. for life; anticipation or payment to as-

[1] In Spindle v. Shreve, 9 Biss. 199, 200, S. C. 4 Fed. Rep. 136, the will contained this provision: "One-half of each share (which half I wish to be income-paying real estate) I desire to be set apart and conveyed to a trustee, to be held for the use and benefit of each child during his or her life, and then descend to his or her heirs, without any power or right on the part of said child to encumber said estate, or anticipate the rents thereof." One of the children became a bankrupt and the question presented upon a bill filed by his assignee was whether this child "had such an interest in this property that it passed to the assignee, and so could be held for the benefit of the creditors; or whether it was an estate which was to be held for his personal benefit for life, and over which he had no power or control, and which could not go for the benefit of creditors. I have come to the conclusion," continues Drummond, J., "that under the provisions of this will there was no estate which passed to the assignee, but that the property in Chicago is to be held by the trustee to whom it was conveyed by the executor, for the benefit of the son during his life, and that the rents and profits of the estate are to be paid over to him personally, and that he has no power to transfer any interest which he has in the estate so as to defeat the provisions made in the will. This will is attacked on the ground that the provision made for the son is contrary to public policy, and is, therefore, inoperative and void. I hardly think the authorities warrant that conclusion, and, if they do not, then the only question is, What is the legal effect of this provision in the will, and what was the testator's intention in relation to the estate which was to be held by the trustee? The authorities collected in the case of Nichols v. Eaton, 91 U. S. 716, show that it was competent for the testator to make such a provision as this, namely: to declare by his will that his estate, or any portion of it, might be held for a child's sole benefit during life, and in such a way that it could not be reached by creditors." It is said in New Jersey that the jurisdiction of the Court of Chancery in reaching property of a judgment-debtor does not extend to trust property where the trust has been created by some person other than the debtor. Hence where a sum was left to executors in trust to pay the income and such part of the principal as the *cestui que trust* should wish, to her, and she requested the trustees to invest the fund in a farm, it was held that such farm could not be reached by a creditor of the *cestui que trust*. Lippincott v. Evens, 35 N. J. Eq. 553. See Easterly v. Keney, 36 Conn. 18.

[2] Gray on Restraints, § 166.

[3] 5 R. I. 205.

signs was prohibited, the income being intended for the sole and separate use of H. An assignee of H. for the benefit of creditors was awarded the income for the life of H. The court said: "This has been the settled doctrine of a court of chancery, at least since Brandon v. Robinson,[1] and, in application to such a case as this, is so honest and just that we would not change it if we could. Certainly no man should have an estate to live on, but not an estate to pay his debts with. Certainly property available for the purposes of pleasure or profit should be also amenable to the demands of justice."[2] In Bramhall v. Ferris,[3] Comstock, J., observed that if a bequest is given "absolutely for life, with no provision for its earlier termination, and no limitation over in the event specified, any attempt of the testator to make the interest of the beneficiary inalienable, or to withdraw it from the claims of creditors, would have been nugatory. Such an attempt would be clearly repugnant to the estate in fact devised or bequeathed, and would be ineffectual for that reason as well as upon the policy of the law."[4] And where trustees held property with power to apply such portion of it as they saw fit to the education and maintenance of a beneficiary until he should reach twenty-five years, and then to convey the principal with all accretions to him, the power being given to the trustees in their discretion to convey the estate to the beneficiary before he was twenty-five years of age, it was held that the beneficiary's interest was liable for his debts.[5]

§ 367. **Broadway Bank v. Adams.**—We will not further pursue this subject except to notice an important case in

[1] 18 Ves. 429.

[2] See Pace v. Pace, 73 N. C. 119; Bailie v. McWhorter, 56 Ga. 183; Easterly v. Keney, 36 Conn. 18. It should be noted that Nichols v. Eaton, 91 U. S. 716, came up on appeal from the State in which Tillinghast v. Bradford, 5 R. I. 205, was decided.

[3] 14 N. Y. 41.

[4] Citing Blackstone Bank v. Davis, 21 Pick. (Mass.) 42; Hallett v. Thompson, 5 Paige (N. Y.) 583; Graves v. Dolphin, 1 Sim. 66; Brandon v. Robinson, 18 Ves. 429.

[5] Daniels v. Eldredge, 125 Mass. 356. See Havens v. Healy, 15 Barb. (N. Y.) 296.

Massachusetts—Broadway Bank v. Adams.[1] The object of the bill was to reach and apply to the payment of the plaintiff's claim the income of a trust fund created for the debtor's benefit by the will of his brother. Briefly the will gave $75,000 to executors, in trust, to pay the net income to the debtor semi-annually during his natural life, the payments to be made personally or upon his order or receipt in writing, "in either case free from the interference or control of his creditors, my intention being that the use of said income shall not be anticipated by assignment." The income after the debtor's death was to go to his wife and children, and upon the death or remarriage of the wife, the principal and accumulations were to be divided among the children. Manifestly the intention of the testator was that the income should be free from the claims of creditors, and that the courts should be unable to compel the trustee to divert the income unless the provisions and intention were unlawful. The court observe at the outset that "the question whether the founder of a trust can secure the income of it to the object of his bounty, by providing that it shall not be alienable by him or be subject to be taken by his creditors, has not been directly adjudicated" in Massachusetts, but say that the tendency of the decisions has been in favor of such a power in the founder.[2] The reason of the rule that a restriction upon the power of alienation is void because it is repugnant to the grant, is said not to apply to the case of a transfer of the property in trust, as by the creation of the trust the property passes to the trustee with all its incidents and attributes unimpaired. The trustee "takes the whole legal title to the property, with the power of alienation; the *cestui que trust* takes the whole legal title to the accrued

[1] 133 Mass. 170.

[2] Citing Braman v. Stiles, 2 Pick. (Mass.) 460; Perkins v. Hays, 3 Gray (Mass.) 405; Russell v. Grinnell, 105 Mass. 425; Hall v. Williams, 120 Mass. 344; Sparhawk v. Cloon, 125 Mass. 263.

income at the moment it is paid over to him. Neither the principal nor the income is at any time inalienable." It is conceded by the court that from the time of Lord Eldon the rule has prevailed in the English Court of Chancery, to the effect that when the income of a trust estate is given to any person (other than a married woman) for life, the equitable estate for life is alienable by, and liable in equity to the debts of, the *cestui que trust*, and that this quality is so inseparable from the estate that no provision however express, which does not operate as a cesser or limitation of the estate itself, can protect it from his debts.[1] The English rule, the court observe, has been followed in some of the American cases,[2] while other courts "have rejected it, and have held that the founder of a trust may secure the benefit of it to the object of his bounty, by providing that the income shall not be alienable by anticipation, nor subject to be taken for his debts."[3]

Morton, C. J., said: "The founder of this trust was the absolute owner of his property. He had the entire right to dispose of it, either by an absolute gift to his brother, or by a gift with such restrictions or limitations, not repugnant to law, as he saw fit to impose. . . . . We do not see why the founder of a trust may not directly provide that his property shall go to his beneficiary with the restriction that it shall not be alienable by anticipation, and that his creditors shall not have the right to attach it in advance, instead of indirectly reaching the same result by a provision for a cesser or a limitation over, or by giving his

[1] Brandon v. Robinson, 18 Ves. 429; Green v. Spicer, 1 Russ. & Myl. 395; Rochford v. Hackman, 9 Hare 475; Trappes v. Meredith, L. R. 9 Eq. 229; Snowdon v. Dales, 6 Sim. 524; Rippon v. Norton, 2 Beav. 63.

[2] Tillinghast v. Bradford, 5 R. I. 205; Heath v. Bishop, 4 Rich. Eq. (S. C.) 46; Dick v. Pitchford, 1 Dev. & B. Eq. (N. C.) 480; Mebane v. Mebane, 4 Ired. Eq. (N. C.) 131.

[3] Citing Holdship v. Patterson, 7 Watts (Pa.) 547; Shankland's Appeal, 47 Pa. St. 113; Rife v. Geyer, 59 Pa. St. 393; White v. White, 30 Vt. 338; Pope v. Elliott, 8 B. Mon. (Ky.) 56; Nichols v. Eaton, 91 U. S. 716; Hyde v. Woods, 94 U. S. 523.

trustees a discretion as to paying it. He has the entire *jus disponendi*, which imports that he may give it absolutely, or may impose any restrictions or fetters not repugnant to the nature of the estate which he gives. Under our system creditors may reach all the property of the debtor not exempted by law, but they cannot enlarge the gift of the founder of a trust, and take more than he has given."

This is probably the most advanced statement of the objectionable doctrine. Reference is here made to cases like Broadway Bank v. Adams, and to the *dictum* in Nichols v. Eaton, not as embodying salutary rules or wise principles of law, but rather to record a protest against the existence and growth of a class of cases which at present are comparatively few in number. The creation of an aristocracy of prodigals, who can dwell in luxury and defy their creditors, brings the administration of justice into disrepute, and has a demoralizing influence upon honest people. The creditor is unjustly deprived of the power to compel his debtor to forego the comforts and luxuries of wealth, or to feel the privations incident to insolvency. The tendency of these cases must be checked by legislation, or the sober second thought of the courts; the doctrine will never be tolerated by the American people.

§ 368. **Spendthrift trusts in Pennsylvania.**—It is common to refer to Pennsylvania as the birthplace and stronghold of the doctrine of spendthrift trusts.[1] Yet Chief-Justice Agnew said, in Overman's Appeal:[2] "It [a spendthrift trust] is exceptionable in its very nature, because it contravenes that general policy which forbids restraints on alienation and the non-payment of honest debts. . . . . A trust to pay income for life may last for the longest period of

[1] See Fisher v. Taylor, 2 Rawle (Pa.) 33; Holdship v. Patterson, 7 Watts (Pa.) 547; Shankland's Appeal, 47 Pa. St. 113; Ashhurst v. Given, 5 W. & S. (Pa.) 323; Brown v. Williamson, 36 Pa. St. 338; Still v. Spear, 45 Pa. St. 168.

[2] 88 Pa. St. 276, 281.

human existence, and may run for seventy or eighty years. While the law simply tolerates such a trust, it cannot approve of it as contributing to the general public interest. Property tied up for half a century contributes nothing to the general wealth, while it is a great stretch of liberality to the ownership of it to suffer it to remain in this anomalous state for so many years after its owner has left it behind him. Clearly it is against public interest that the property of an after generation shall be controlled by the deed [*qu.* dead] of a former period, or that the non-payment of debts should be encouraged." [1]

[1] See Gray on Restraints, § 234.

CHAPTER XXIV.

BONA FIDE PURCHASERS—ACTUAL AND CONSTRUCTIVE NOTICE—FRAUDULENT GRANTEES.

§ 369. Rights of *bona fide* purchasers.
370. Generality of the rule.
371. Mortgagee as *bona fide* purchaser.
372. Without notice.
373. Kinds of notice.
374. Constructive notice of fraud.
375. } Rule in Stearns v. Gage.
376. }
377. Carroll v. Hayward—Actual belief.
378. Parker v. Conner.
379. }
380. } Facts sufficient to excite inquiry.
381. }
§ 382. Actual belief.
383. Purchaser with notice.
384. Purchaser with notice from *bona fide* purchaser.
385. Fraudulent grantee as trustee.
386. Title from fraudulent vendee.
387. Creditors of fraudulent grantees.
388. Liability between fraudulent grantees.
389. Fraudulent grantee sharing in the recovery.

§ 369. **Rights of bona fide purchasers.**—As has been observed, creditors have an equitable interest in the property of their debtors, or in the means the latter have of satisfying the creditors' demands,[1] which the law will under certain circumstances enforce, since the insolvent's property constituted the foundation and inducement of the trust and credit.[2] But the interests of a *bona fide* purchaser of a debtor's property are superior to those of creditors, for the obvious reason that the former has not, like a mere general creditor, trusted "to the personal responsibility of the debtor, but has paid the consideration upon the faith of the debtor's actual title to the specific property transferred."[3]

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[1] Seymour v. Wilson, 19 N. Y. 418. See Chap. II.

[2] Egery v. Johnson, 70 Me. 261. See § 5.

[3] Seymour v. Wilson, 19 N. Y. 417, 420. See Friedenwald v. Mullan, 10 Heisk. (Tenn.) 229; Goshorn v. Snodgrass, 17 W. Va. 717; Thames v.

In such a case the interests of the general creditors are superseded or defeated by the purchaser's superior equity.[1] It is merely a substitution of property. The value given or paid by the purchaser has taken the place of the property which he received. Hence the rights of a *bona fide* grantee who has paid a full valuable consideration are protected,[2] though the grantor may have been actuated by a fraudulent intention. Still, as we have seen, a grantee is not protected when he has not paid such a consideration, though he may have acted in good faith. The two must concur.[3] If no consideration has been given then there has been no substitution of property. The amount of the consideration is not necessarily material when the grantor is solvent,[4] but when he is insolvent the kind and amount of consideration become material and important, even in the absence of actual intent to defraud. Thus an agreement to support an insolvent grantor may be a valuable consideration, but it is not sufficient to uphold a conveyance as against prior creditors,[5] even though there may have been no actual intent to defraud.[6] Persons receiving a conveyance from a grantor for such a consideration must

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Rembert, 63 Ala. 561; Collumb v. Read, 24 N. Y. 516; Mansfield v. Dyer, 131 Mass. 200; Comey v. Pickering, 63 N. H. 126; Zoeller v. Riley, 100 N. Y. 102; Simpson v. Del Hoyo, 94 N. Y. 189; Paddon v. Taylor, 44 N. Y. 371; Lore v. Dierkes, 16 Abb. N. C. (N. Y.) 47.

[1] In Zoeller v. Riley, 100 N. Y. 108, Earl, J., said: "A debtor may dispose of his property with the intent to defraud his creditors and yet give a good title to one who pays value and has no knowledge of, and does not participate in the fraud. (2 R. S. 137, § 5; Starin v. Kelly, 88 N. Y. 418; Murphy v. Briggs, 89 N. Y. 446; Parker v. Conner, 93 N. Y. 118.)"

[2] See Hawkins v. Davis, 8 Baxt. (Tenn.) 508.

[3] Savage v. Hazard, 11 Neb. 327; Danbury v. Robinson, 14 N. J. Eq. 213. See §§ 15, 207. In Keyser v. Angle, 40 N. J. Eq. 481, it appeared that a sister purchased land of a brother who was in debt. She paid $50 cash and gave her note for $650, which he held for four years though very needy. It was held that if the sister had notice of the fraud before she paid the note she was not a *bona fide* purchaser, even though she had no notice when she took the deed.

[4] Usher v. Hazeltine, 5 Me. 471; Hapgood v. Fisher, 34 Me. 407.

[5] Rollins v. Mooers, 25 Me. 192–199.

[6] Webster v. Withey, 25 Me. 326.

see to it that the existing debts of the grantor are paid,[1] and it is immaterial that the consideration comprises a present sum of money paid in addition to the agreement for support, provided the money alone were palpably inadequate.[2]

Three things must concur to protect the title of the purchaser.[3] (1) He must buy without notice of the bad intent on the part of the vendor. (2) He must be a purchaser for a valuable consideration; and (3) He must have paid the purchase-money before he had notice of the fraud.[4] Chief-Justice Marshall observes that "the rights of third persons, who are purchasers without notice for a valuable consideration, cannot be disregarded. Titles, which, according to every legal test, are perfect, are acquired with that confidence which is inspired by the opinion that the purchaser is safe. If there be any concealed defect, arising from the conduct of those who had held the property long before he acquired it, of which he had no notice, that concealed defect cannot be set up against him. He has paid his money for a title good at law; he is innocent, whatever may be the guilt of others, and equity will not subject him to the penalties attached to that guilt. All titles would be insecure, and the intercourse between man and man would be very seriously obstructed if this principle be overturned."[5] Dillon, J., in Gardner v. Cole,[6] said that "where the first conveyance originates in a fraudulent purpose, and is without any consideration of value, and the grantor remains in possession, and claiming ownership sells the property as his own to a party who buys without actual notice of the prior deed and pays value, the latter pur-

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[1] Hapgood v. Fisher, 34 Me. 407.

[2] Sidensparker v. Sidensparker, 52 Me. 481. See Egery v. Johnson, 70 Me. 261.

[3] Dougherty v. Cooper, 77 Mo. 532.

[4] See Arnholt v. Hartwig, 73 Mo. 485; Bishop v. Schneider, 46 Mo. 472; Dixon v. Hill, 5 Mich. 408.

[5] Fletcher v. Peck, 6 Cranch 133.

[6] 21 Iowa 205, 214.

chaser may avoid the prior voluntary and fraudulent conveyance."[1]

§ 370. **Generality of the rule.**—A court of equity acts only on the conscience of the party; and if he has done nothing that taints it, no demand can attach so as to give jurisdiction.[2] The rule is not limited to cases where conveyances are made in fraud of creditors, but applies to cases in which the vendor has been swindled out of his property by a vendee, for whenever the property reaches the hands of a *bona fide* purchaser for value, the rights and equities of the defrauded owner are cut off.[3] "A purchaser for a valuable consideration, without notice of a prior equitable right, obtaining the legal estate at the time of his purchase, is entitled to priority in equity as well as at law, according to the well-known maxim that when the equities are equal the law shall prevail."[4]

If creditors condone the fraud the grantee's title is good against all comers.[5]

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[1] See Hurley v. Osler, 44 Iowa 646. See note as to the rights of transferees and others under conveyances in fraud of creditors and of trusts, at end of Lore v. Dierkes, 16 Abb. N. C. (N. Y.) 47, 59.

[2] Boone v. Chiles, 10 Pet. 177. In Knowlton v. Hawes, 10 Neb. 534, it appeared that a father, after an obligation had been incurred, but before judgment, conveyed his real estate, worth more than $5,000, to his son, who had but little means, for an expressed consideration of $4,900, $300 being paid in cash, $250 in a span of horses, and $450 for labor alleged to have been previously performed, two unsecured notes, one for the sum of $1,000, payable in two years, and one for $2,000, payable in five years, and $900 to be paid in certain mortgages. It was held, on the testimony, that the son was not a *bona fide* purchaser of the land, and that it was liable for the payment of the judgment.

[3] Paddon v. Taylor, 44 N. Y. 371; Brower v. Peabody, 13 N. Y. 121; Load v. Green, 15 M. & W. 216; Smart v. Bement, 4 Abb. App. Dec. (N. Y.) 253. Though the Rhode Island statute omits the provision about *bona fide* purchasers for value contained in the English statute, it is considered that the statute should be construed the same as though that provision had not been omitted. Tiernay v. Claflin, 15 R. I. 220.

[4] Townsend v. Little, 109 U. S. 512. Citing Williams v. Jackson, 107 U. S. 478; Willoughby v. Willoughby, 1 T. R. 763; Charlton v. Low, 3 P. Wms. 328; *Ex parte* Knott, 11 Ves. 609; Tildesley v. Lodge, 3 Sm. & Giff. 543; Shine v. Gough, 1 Ball & B. 436; Bowen v. Evans, 1 Jones & La T. 264; Vattier v. Hinde, 7 Pet. 252. Absence of good faith must be made out by a clear preponderance of evidence. Bradford v. Bradford, 60 Iowa 202.

[5] Millington v. Hill, 47 Ark. 309.

§ 371. **Mortgagee as bona fide purchaser.**—A mortgagee is a purchaser to the extent of his interest.[1] New York has taken an advanced position on this question. It is held in that State that where property is conveyed to a voluntary grantee, and the latter, at the grantor's request, executes a mortgage upon the land to a creditor of the grantor, to secure a debt of the grantor's which existed at the time of the conveyance, the mortgagee is a *bona fide* purchaser for a valuable consideration, and though the conveyance may be set aside by other creditors, the mortgagee will not be affected.[2] The giving of the mortgage was regarded as merely applying the property for the benefit of creditors by rescinding the fraudulent transaction, and entering into a new valid contract. As we have seen,[3] the law does not deprive parties of the right to restore to its legitimate purposes property which has been fraudulently appropriated.[4]

§ 372. **Without notice.**—Judge Story observes that: "It is a settled rule in equity that a purchaser without notice, to be entitled to protection, must not only be so at the time of the contract or conveyance, but at the time of the payment of the purchase-money."[5] On the other hand it was said in a case which arose in Georgia that the purchaser at a sale made with intent to defraud creditors, if himself free from all responsibility for the fraud, was not affected upon afterward discovering the seller's fraudulent intent,

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[1] Ledyard v. Butler, 9 Paige (N. Y.) 132; Murphy v. Briggs, 89 N. Y. 451; Zoeller v. Riley, 100 N. Y. 108.

[2] Murphy v. Briggs, 89 N. Y. 446. See upon this confused question 2 Pomeroy's Eq. Jur. §§ 748, 749, and cases cited; Metropolitan Bank v. Godfrey, 23 Ill. 579; Manhattan Co. v. Evertson, 6 Paige (N. Y.) 457; Lowry v. Smith, 9 Hun (N. Y.) 514; Smart v. Bement, 4 Abb. App. Dec. (N. Y.) 253; Willoughby v. Willoughby, 1 T. R. 763; Dickerson v. Tillinghast, 4 Paige (N. Y.) 215; Boyd v. Beck, 29 Ala. 713; Wells v. Morrow, 38 Ala. 125; Porter v. Green, 4 Iowa 571.

[3] See § 176.

[4] Murphy v. Briggs, 89 N. Y. 446. But compare Wood v. Robinson, 22 N. Y. 564.

[5] Wormley v. Wormley, 8 Wheat. 449. See Arnholt v. Hartwig, 73 Mo. 485.

even though he had not then paid the purchase-money, and the notes given for it had not passed beyond the control of himself and the seller, it not appearing that he alone could control the notes without the co-operation of the seller, or that the latter could have been induced to cancel or surrender the notes, which were negotiable.[1] In the United States, even in States where the statutes are a literal rescript of the English statutes of 13 and 27 Elizabeth, the general doctrine is, that the right of the subsequent purchaser to avoid the first conveyance will depend on whether he had notice of its existence at the date of his purchase.[2] This leads us to the consideration of one of the most important branches of our subject, the doctrine of notice as applied to covinous alienations.

§ 373. **Kinds of notice.**—Notice is of two kinds, actual and constructive.[3] Actual notice may be shown to have been received or given by all degrees and grades of evidence, from the most direct and positive proof to the slightest circumstance from which a jury would be warranted in inferring notice. It is a mere question of fact, and is open to every species of legitimate evidence which may tend to strengthen or impair the conclusion. Constructive notice, on the other hand, is a legal inference from established facts; and like other legal presumptions, does not admit of dispute.[4] "Constructive notice," says Judge Story, "is in its nature no more than evidence of notice, the presumption of which is so violent that the court will not even allow of its being controverted."[5] Substantially

[1] Nicol v. Crittenden, 55 Ga. 497.

[2] See Prestidge v. Cooper, 54 Miss. 77; Wyman v. Brown, 50 Me. 148, lays down the rule, however, that a fraudulent voluntary conveyance is void as against a subsequent purchaser even with notice. See Hudnal v. Wilder, 4 McCord's (S. C.) Law 295.

[3] Lord Erskine in Hiern v. Mill, 13 Ves. 120.

[4] Selden, J., in Williamson v. Brown, 15 N. Y. 359; Griffith v. Griffith, 1 Hoffm. Ch. (N. Y.) 155; Hiern v. Mill, 13 Ves. 120; Claflin v. Lenheim, 66 N. Y. 306; Birdsall v. Russell, 29 N. Y. 220, 249.

[5] Story's Eq. Jur. § 399; Rogers v. Jones, 8 N. H. 270; Cambridge Valley Bank v. Delano, 48 N. Y. 339.

the same language is employed by Mr. Justice Woods in Townsend v. Little.[1] Chancellor Kent said: "I hold him chargeable with constructive notice, or notice in law, because he had information sufficient to put him upon inquiry."[2] "Constructive notice," said Wright, J., "is a legal inference from established facts; and when the facts are not controverted, or the alleged defect or infirmity appears on the face of the instrument, and is a matter of ocular inspection, the question is one for the court."[3] Constructive notice has been said to be of two kinds; that which arises upon testimony and that which results from a record.[4]

Actual notice is usually a question for the jury, and is to be established by implication or inference from other facts.[5] There is no particular kind of evidence necessary to establish it; anything that proves it or constitutes legal evidence of knowledge is competent.[6] It is otherwise as to constructive notice. There the law imputes notice to the purchaser, and whether or not this will be done upon a conceded state of facts is not a question for the jury.[7]

§ 374. **Constructive notice of fraud.**—The principles which govern and control the general doctrine of constructive notice of fraud as bearing upon our subject are not always

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[1] 109 U. S. 511. Citing Plumb v. Fluitt, 2 Anstr. 432; Kennedy v. Green, 3 Mylne & K. 699.

[2] Sterry v. Arden, 1 Johns. Ch. (N. Y.) 261, 267.

[3] Birdsall v. Russell, 29 N. Y. 249. See Page v. Waring, 76 N. Y. 471.

[4] Griffith v. Griffith, 1 Hoffm. Ch. (N. Y.) 156.

[5] Bradbury v. Falmouth, 18 Me. 65.

[6] Trefts v. King, 18 Pa. St. 160.

[7] Birdsall v. Russell, 29 N. Y. 249. "If the doctrine of constructive notice is applicable, it is immaterial how the fact is. The jury may be satisfied that the purchaser was, in fact, entirely innocent and free from any guilty knowledge, or even suspicion of fraud; but if they find that facts were known to him which were calculated to put him on inquiry, his want of diligence in making such inquiry is equivalent to a want of good faith, and the presumption of notice is a legal presumption which is uncontrovertible." Rapallo, J., in Parker v. Conner, 93 N. Y. 124. "The whole basis of the rule is negligence in the purchaser. It is a question of good faith in him." Peckham, J., in Acer v. Westcott, 46 N. Y. 384, 389.

entirely clear. Williamson v. Brown,[1] already cited, contains an important review of the authorities by the learned Justice Selden, as to the general subject of notice. Baker v. Bliss,[2] where the question was as to whether or not a purchaser took with knowledge of the fraud affecting the title of his vendor, seems to clearly establish the rule that to charge a party with such notice the circumstances known to him must be of such character as ought reasonably to have excited his suspicion, and led him to inquire.[3] It appeared that the purchaser had paid a valuable consideration, and had testified and the referee had found, that he had no actual notice or knowledge of the fraud which rendered the conveyance void as against creditors, "but that he had sufficient knowledge to put him upon inquiry, and that such knowledge was equivalent to notice, and in law amounted to constructive notice." Cases like Williamson v. Brown[4] are cited and applied in the opinion. In Ellis v. Horrman,[5] a record act case, Tracy, J., said: "Notice sufficient to make it the duty of a purchaser to inquire, and failure so to do when information is easily accessible, is equivalent to actual notice within the rule of the authorities." Paige, J., observed in Williamson v. Brown:[6] "A party in possession of certain information will be chargeable with a knowledge of all facts which an inquiry suggested by such information, prosecuted with due diligence, would have disclosed to him."[7]

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[1] 15 N. Y. 362.

[2] 39 N. Y. 70.

[3] See Burnham v. Brennan, 10 J. & S. (N. Y.) 79; reversed, 74 N. Y. 597.

[4] 15 N. Y. 362.

[5] 90 N. Y. 473.

[6] 15 N. Y. 364.

[7] See Howard Ins. Co. v. Halsey, 4 Sandf. (N. Y.) 578; Kennedy v. Green, 3 Mylne & K. 699; Flagg v. Mann, 2 Sumner 534; Bennett v. Buchan, 76 N. Y. 386; Grimstone v. Carter, 3 Paige (N. Y.) 421; Taylor v. Baker, 5 Price 306; Jones v. Smith, 1 Hare 43-55. Compare Pringle v. Phillips, 5 Sandf. (N. Y.) 157; Danforth v. Dart, 4 Duer (N. Y.) 101; Roeber v. Bowe, 26 Hun (N. Y.) 556; Pitney v. Leonard, 1 Paige (N. Y.) 461; Peters v. Goodrich, 3 Conn. 146; Booth v. Barnum, 9 Conn. 286; Whitbread v. Jordan, 1 Y. & C. 328; Shaw v. Spencer, 100 Mass. 390; Jenkins v. Eldredge, 3 Story 181; Heaton v. Prather, 84 Ill. 330; Garahy v. Bayley, 25 Tex. Supp. 294; Birdsall v. Russell, 29 N. Y. 220.

In Reed v. Gannon[1] it appeared that the parties dealt upon the assumption that there were liens or incumbrances upon the property, but their number, extent, or character was not stated. Rapallo, J., said: "The insertion of these clauses in the instrument was sufficient to put the plaintiffs on inquiry as to the extent and description of the existing incumbrances referred to." It was such notice as in the language of the authorities "would lead any honest man, using ordinary caution, to make further inquiries."[2] "Constructive notice," says Haight, J., in Farley v. Carpenter,[3] "is a knowledge of circumstances which would put a careful and prudent person upon inquiry, or such acts as the law will presume the person had knowledge of, on the grounds of public policy; as, for instance, the laws and public acts of the government, instruments recorded pursuant to law, advertisements in a newspaper of a notice or process authorized by statute."[4]

§ 375. **Rule in Stearns v. Gage.**—The question of what constitutes "notice" of fraud, or of a fraudulent intent, is one of manifest importance to creditors and purchasers. Some apparent dissension has been introduced into this branch of the subject by a *dictum* of Miller, J., in Stearns v. Gage,[5] followed by the New York Supreme Court in Farley v. Carpenter,[6] and recently approved in Parker v.

[1] 50 N. Y. 345. See Parker v. Conner, 93 N. Y. 126.

[2] Whitbread v. Jordan, 1 Y. & C. 328. See Acer v. Westcott, 46 N. Y. 384; Cambridge Valley Bank v. Delano, 48 N. Y. 340. Compare, however, Battenhausen v. Bullock, 11 Bradw. (Ill.) 665.

[3] 27 Hun (N. Y.) 362.

[4] "The doctrine of constructive notice," says Rapallo, J., "has been most generally applied to the examination of titles to real estate. It is the duty of a purchaser of real estate to investigate the title of his vendor, and to take notice of any adverse rights or equities of third persons which he has the means of discovering, and as to which he is put on inquiry. If he makes all the inquiry which due diligence requires, and still fails to discover the outstanding right, he is excused; but if he fails to use due diligence, he is chargeable, as matter of law, with notice of the facts which the inquiry would have disclosed." Parker v. Conner, 93 N. Y. 124. See Acer v. Westcott, 46 N. Y. 384, and cases cited.

[5] 79 N. Y. 102.

[6] 27 Hun (N. Y.) 359. See 23 Alb. L. J. 126.

Conner.[1] According to the court's own statement it could not "be claimed that any question as to constructive notice was presented upon the trial" in Stearns v. Gage, and it seems unfortunate that the questionable sentences should have been embodied in the opinion. The court observe that "actual notice is required where a valuable consideration has been paid." The statute relating to fraudulent conveyances[2] in New York contains a provision that it "shall not be construed in any manner, to affect or impair the title of a purchaser for a valuable consideration, unless it shall appear that such purchaser had previous notice of the fraudulent intent of his immediate grantor, or of the fraud rendering void the title of such grantor." The court say that "this plainly means that actual notice shall be given of the fraudulent intent or knowledge of circumstances which are equivalent to such notice. *Circumstances to put the purchaser on inquiry where full value has been paid are not sufficient.* . . . . No authority has been cited which sustains the principle that a purchaser for a valuable consideration, without previous notice, is chargeable with constructive notice of the fraudulent intent of his grantor; and such a rule would carry the doctrine of constructive notice to an extent beyond any principle which has been sanctioned by the courts, and cannot be upheld."

It must be noted that the word "actual" is not embodied in the statute, but has been in effect interpolated by this construction. We dissent decidedly from the statement that the statute "plainly means that actual notice shall be given of the fraudulent intent." Such a construction violates the settled rule that statutes of this character shall be liberally construed for the suppression of fraud.[3] It is to be regretted that the utterances quoted occur in a case in which no facts sufficient to put a purchaser on in-

[1] 93 N. Y. 118. [2] 2 R. S. N. Y. 137, § 5. [3] See § 20.

quiry, or to constitute what is often called constructive notice of fraud, were found or were actually present. Had the court been confronted with such facts and compelled to squarely face the question, these remarks, which we consider unfortunate, might never have been made. It is idle to assail the case with violent language, as has more than once been done; but we should rather view the objectionable sentences as an unguarded utterance, and entertain the hope that the questionable features of the opinion will be hereafter limited and distinguished, and perhaps ultimately overturned. "Knowledge of circumstances which are equivalent to" actual notice are regarded in the opinion as sufficient evidence of notice. This plainly implies that the court does not mean to require proof that as matter of fact the purchaser was informed personally of the debtor's or vendor's fraudulent intention, but leaves open the wide field of circumstances by which actual notice may be inferred, implied, and fastened upon him. In other words, "circumstantial evidence" will suffice.[1] In Farley v. Carpenter,[2] which follows and adopts Stearns v. Gage,[3] the court at general term say: "A person may be chargeable with constructive notice and still have no actual notice. Fraud implies an evil or illegal intent. Such intent can only exist in case of knowledge. Under this statute fraud is not a question of negligence, it is a question of knowledge and intent; a party may be negligent in not examining the records for liens and incumbrances on real estate before effecting a purchase, and still be strictly honest, and innocent of fraud."

We deny that fraud necessarily "implies an evil or illegal intent." The transaction may be pure and honest as regards the debtor's mental emotions, or his belief, or when measured by his standard of morality, and yet be pro-

[1] Farley v. Carpenter, 27 Hun (N. Y.) 362.

[2] 27 Hun (N. Y.) 362.

[3] 79 N. Y. 102.

nounced by the courts fraudulent and void in law. Nor is fraud always "a question of knowledge and intent," because, by a fiction of law, knowledge is constantly imputed by statutes, and by the courts, in cases where it does not in fact exist, and no evil intent is present.

§ 376. — It seems startling if not preposterous to say that circumstances which ought to "put the purchaser on inquiry" are "not sufficient" to taint the transaction with fraud, or to warrant the conclusion that the vendee is not a *bona fide* purchaser. We submit that this statement is inaccurate and misleading. The confusion undoubtedly results in part from a failure to distinguish between circumstantial evidence sufficient to establish or justify a finding of actual notice of fraud and facts which raise the presumption of constructive notice. The facts and circumstances sufficient in either phase of the question to establish notice or bad faith in the vendee bear a close resemblance, if indeed they are not often identical; hence the doctrine of Stearns v. Gage, if it is effectual for any purpose, is to be regarded as seriously impeding, if not breaking the force of *indicia* and circumstances as evidence of guilty knowledge. What object is to be subserved in endeavoring to establish knowledge or notice of a fraudulent intent by proof of surrounding circumstances, if facts sufficient to put an honest man "on inquiry" count for nothing? Are not facts manifestly sufficient to excite grave suspicions, at least evidence tending to prove actual notice? Is not a court or jury justified in finding actual notice from facts which should excite inquiry or raise a presumption of constructive notice? In short is a court or jury justified in finding, as matter of fact, absence of actual notice in cases where facts sufficient to create a clear presumption of constructive notice are in evidence? Can such a verdict or finding be said to honestly reflect the evidence? It seems incredible that a party whose suspicions concerning the fairness and

good faith of a transaction must have been excited by the exceptional and peculiar conduct of the parties, can preserve the character of a *bona fide* purchaser, either by listless inattention and indifference concerning the *indicia* of fraud, or by active and positive efforts to avoid all knowledge of the true motive or design of the debtor. This would be offering a premium to vendees who masqueraded as mutes, or who declined to use their eyes and ears to discover the fraud, the evidence of which surrounded them on every side. Is not such a vendee guilty of a "fraudulent turning away from knowledge"? Must not a person who willfully closes his eyes to avoid seeing what he believes he would have discovered had he kept them open, be considered as having perceived or detected "what any man with his eyes open would have seen"?[1] Is a party who has eyes to be permitted to say that he saw not, and who has ears to be permitted to say that he heard not? When the warning signal has been sounded, and the attention of a party has been aroused, is it not incumbent on such party to *stay his hand* until he shall ascertain by the requisite inquiries the facts foreshadowed by the suspicious circumstances?[2] In Farley v. Carpenter[3] the purchaser testified that he thought something was up from the way the debtor talked: "He sent for me; he wanted to sell me his farm; I said, 'What is up?' he said, 'You need not ask any questions nor say anything for two or three days.'" The court said it did "not necessarily follow that he should infer" that the debtor "was designing to cheat and defraud his creditors and flee from the State." This case, it seems to us, is squarely opposed to Baker v. Bliss,[4] and can scarcely

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[1] De Witt v. Van Sickle, 29 N. J. Eq. 214. A party "has no right to shut his eyes or his ears to the inlet of information, and then say he is a *bona fide* purchaser without notice." Burwell v. Fauber, 21 Gratt. (Va.) 463.

[2] Compare Pinckard v. Woods, 8 Gratt. (Va.) 140.

[3] 27 Hun (N. Y.) 361.

[4] 39 N. Y. 70.

be reconciled with the views of Rapallo, J., in a case to be presently noticed, in which he entertains "no doubt that it is legitimate for the jury in such cases to consider whether the vendee *had knowledge of facts pointing to a fraudulent intent or calculated to awaken suspicion, and that actual notice of a fraudulent intent on the part of the vendor need not be established by direct proof. The fact of notice or knowledge may be inferred from circumstances.*"[1]

Let the reader briefly consider this subject in its practical application and bearing. A debtor contemplating flight, suddenly offers to sell his tangible property at a sacrifice for cash to a vendee who sees in the transaction the usual *indicia* surrounding fraudulent alienations, sufficient to put a purchaser "on inquiry." No inquiry is made, the vendee takes title to the debtor's property, or, more properly speaking, to the creditors' trust fund,[2] and provides the debtor with its equivalent in money which has no earmarks and is easily secreted or dissipated, and the latter absconds. Here the vendee has actually facilitated the consummation of the fraud by furnishing the debtor with a portion of its value in cash in consideration of receiving the property at a sacrifice.[3] Is not the purchaser at least a *quasi* conspirator in such a case, even though the debtor did not openly avow his fraudulent purpose? Imprudence or inattention to the suspicious circumstances may possibly be overlooked, but can willful blindness be pardoned?[4]

[1] Parker v. Conner, 93 N. Y. 124; s. p. Carroll v. Hayward, 124 Mass. 122; Moore v. Williamson, 44 N. J. Eq. 504; Bush v. Roberts, 111 N. Y. 282.

[2] See § 14; Egery v. Johnson, 70 Me. 261.

[3] Compare Singer v. Jacobs, 11 Fed. Rep. 561; Clements v. Moore, 6 Wall. 299.

[4] "If the facts and circumstances are such as ought to have excited suspicion and led to inquiry, the purchaser is regarded as having received notice of a fraudulent intent and required to investigate, and on the trial to explain or in some way overcome the effect of the notice thus given. Purchasers, under the circumstances suggested, cannot shut their eyes and shield themselves by proof of the payment of a consideration. They further and perfect the wrongful intent of the debtor when they assist him to dispose of his property." Herrlich v. Brennan, 11 Hun (N. Y.) 195.

Again, suppose a deed is made for full value by A. to B., containing recitals or provisions which render it voidable as to creditors provided A. is not solvent. In other words its provisions stamp it as fraudulent in law or void against creditors upon its face if A. is insolvent.[1] The instrument is effectual between the parties,[2] and is good against all the world if A. was solvent; it is voidable as matter of law if A. was insolvent. Do not these recitals cast upon B. the duty of investigating and inquiring as to the solvency of A.? If no inquiry is made, and as matter of fact A. is insolvent, do not the recitals of the instrument then constitute *constructive notice* to B. of the fraud intended by A.? The whole supposition of the case is that B. had no *actual* knowledge or notice of the intended fraud.

It is difficult to assign any reason why the doctrine of constructive notice, if it has any application to our subject at all, should not be applied in a case in which adequate consideration has been given. Where the fraudulent intent is present, proof of consideration will not save the transaction; it is merely a fact, a piece of evidence, tending among other things to establish want of notice; but it clearly has no such controlling or overshadowing effect, and bears no such strong relation to the transaction as to justify the court in disregarding, as the basis of a finding of notice, proof of facts sufficient to excite inquiry or suspicion, or to constitute constructive notice. Indeed actual or pretended payment of consideration is almost a necessary incident of a covinous transaction, and often serves as a convenient cover for fraud.

§ 377. **Carroll v. Hayward—Actual belief.**—This question of notice, as applied to our subject, has frequently been up for adjudication in Massachusetts. "Reasonable cause to know," said Ames, J., "is evidence having a tendency, and generally a strong tendency, to prove that the party in

[1] See §§ 9, 10, 322.

[2] See Chap. XXVI.

question did know, but it is a mistake to say that it is the same thing as knowledge. What might convince one man might be insufficient to satisfy the mind of another."[1] Thus in an action for deceit by false representations the *scienter* must be proved and found as matter of fact, and it is not enough merely to prove that the party had reasonable cause to believe the representation untrue, and from that infer *scienter* as a question of law.[2] The distinction between reasonable cause to believe and actual belief is pointed out in Coburn v. Proctor.[3]

§ 378. **Parker v. Conner.**—The New York Court of Appeals again reverted to this general subject in Parker v. Conner.[4] Baker v. Bliss,[5] and Reed v. Gannon,[6] are there emasculated so that creditors can draw little aid or comfort from them, and Stearns v. Gage[7] is considered "suffi-

[1] Carroll v. Hayward, 127 Mass. 122.

[2] Pearson v. Howe, 1 Allen (Mass.) 207; Tryon v. Whitmarsh, 1 Met. (Mass.) 1.

[3] 15 Gray (Mass.) 38. The statute provided (Laws Mass. 1856, chap. 284, § 27) that preferential conveyances made to any person who had "reasonable cause to believe such debtor insolvent," might be avoided by the assignee. In a suit brought to avoid such a transfer, testimony that the defendants believed the debtor perfectly solvent was declared incompetent. It was considered that the only inquiry which under the statute was relevant to the issue was whether the defendants had reasonable cause to believe the debtor insolvent; that is whether, in view of all the facts and circumstances which were known to the defendants concerning the business and pecuniary condition of the debtor in connection with the time and mode of transfer of the property taken, they as reasonable men, acting with ordinary prudence, sagacity, and discretion, had good ground to believe that the debtor was insolvent. "It was not intended by the statute," said Bigelow, J., "to make the actual belief of the party concerning the solvency of the debtor one of the standards by which to test the validity of the transfer of property to him. *Such belief might or might not be well founded. It would be an uncertain and fluctuating standard.* That which would satisfy the mind of one man would be wholly insufficient to convince another; and those facts which would fall far short of producing a belief in a person who was disinterested and impartial might have a very different effect upon the same person when acting under the strong influence of self-interest." Coburn v. Proctor, 15 Gray (Mass.) 38.

[4] 93 N. Y. 118; S. C. 45 Am. Rep. 178. See especially the learned note by Irving Browne, Esq., in which many of the cases here cited are discussed. See 29 Alb. L. J. 244; Bush v. Roberts, 111 N. Y. 282.

[5] 39 N. Y. 70.

[6] 50 N. Y. 345.

[7] 79 N. Y. 102.

cient to dispose of the present controversy." Rapallo, J., one of the ablest judges and clearest writers in the court, said: "We think that in cases like the present, where an intent to defraud creditors is alleged, the question to be submitted to the jury should be whether the vendee did in fact know or believe that the vendor intended to defraud his creditors, not whether he was negligent in failing to discover the fraudulent intent. . . . . The vendor's title and legal right of disposition are unquestioned, and the ground upon which the transfer is impeached is not any defect in the chain of title, but that the vendor's motive in selling was to hinder, delay, or defraud his own creditors. In such a case there is no duty of active vigilance cast upon the purchaser, for the benefit of creditors of the vendor, which should require him to suspect and investigate the motives of the vendor. If he knows or believes them to be fraudulent, he has no right to aid the vendor in his fraudulent scheme, and by so doing he makes himself a party to the fraud. But fraud should not be imputed by the application of the strict rules of constructive notice in such a case, and actual good faith should be sufficient to protect the purchaser." It will thus be seen that the *dictum* of Stearns v. Gage is adopted in a qualified sense. We respectfully urge that the proposed test, Did the vendee "*in fact know or believe* that the vendor intended to defraud his creditors"? is limited, loose, uncertain, and unsatisfactory. The court proceed to state that on general principles, independent of the statute, the same rules are applicable in such cases as govern in determining the *bona fides* of commercial paper, viz.: not whether the holder took the bill or note without exercising sufficient prudence and care, but whether it came into his hands under such circumstances as to charge him with receiving it *mala fide*, and that unless he is fairly chargeable with notice of the fraud, even negligence will not defeat his

title.[1] While conceding that there is some plausibility in the reasons assigned for the non-application of the doctrine of constructive notice to fraudulent transfers, we bow to these decisions of the highest court of a great State with hesitation and reluctance. The great embarrassments under which creditors labor in overcoming the presumptions of legality and good faith which ordinarily inhere in all alienations and transactions of the debtor have already been considered.[2] Proof of fraud is usually an herculean task, and creditors should not consent without a struggle to be divested of so important and useful a factor in their litigations as the doctrine of constructive notice of fraud would be likely to prove. Before further discussing in the abstract what we consider the objections to the principles embodied in these cases we will glance at the many authorities which tend at least to establish a more favorable rule for the creditor class.

§ 379. **Facts sufficient to excite inquiry.**—Let us notice the cases. In Bartles v. Gibson,[3] Bunn, J., with whom Harlan, J., of the United States Supreme Court, concurred, said: "The defendant testified that he knew that his brother was in some difficulty, and that the trouble was of a financial character. Whether he knew all or not, he knew enough to put him upon inquiry. . . . . If he had knowledge of facts sufficient to excite the suspicions of a prudent man and put him on inquiry, *he made himself a party to the fraud.*"[4] Chancellor Zabriskie, after stating that if the

[1] See this rule applied to commercial paper. Crook v. Jadis, 5 Barn. & Adol. 909; Backhouse v. Harrison, 5 Barn. & Adol. 1098; Goodman v. Harvey, 4 Adol. & El. 870; Magee v. Badger, 34 N. Y. 247; Belmont Branch Bank v. Hoge, 35 N. Y. 65, overruling Pringle v. Phillips, 5 Sandf. (N. Y.) 157; Danforth v. Dart, 4 Duer (N. Y.) 101. See Parker v. Conner, 93 N. Y. 128.

[2] See §§ 5, 6, 7, 8, 244, 271.

[3] 17 Fed. Rep. 297; Bedford v. Penny, 58 Mich. 424.

[4] Citing Atwood v. Impson, 20 N. J. Eq. 156; Baker v. Bliss, 39 N. Y. 70; Avery v. Johann, 27 Wis. 251; Kerr on Fraud, 236; David v. Birchard, 53 Wis. 492; S. C. 10 N. W. Rep. 557. See Zimmerman v. Heinrichs, 43 Iowa 260; Coolidge v. Heneky, 11 Ore. 327. In Williamson v. Brown, 15 N. Y. 362, an

object of a debtor in making an alienation is to hinder and delay any of his creditors, the transaction may be avoided, if made to any one having knowledge of the intent, continues: "This knowledge need not be by actual positive information or notice, but will be inferred from the knowledge by the purchaser of facts and circumstances sufficient to raise such suspicions as to put him upon inquiry."[1] In Singer v. Jacobs[2] the court adopt the summary of Mr. Bigelow[3] as follows: "If facts are brought to the knowledge of a party which would put him as a man of common sagacity upon inquiry, he is bound to inquire,[4] and if he neglects to do so, he will be chargeable with notice of what he might have learned upon examination. . . . . If, however, there be no fraudulent turning away from knowledge which the *res gestæ* would suggest to a prudent mind; if mere want of caution, *as distinguished* from fraudulent or willful blindness, is all that can be imputed to a purchaser of property, the doctrine of constructive notice will not apply to him." In Wilson v. Prewett,[5] a suit brought to annul an ante-nuptial settlement, Woods, J., said: "Actual knowledge of the fraudulent intent is not necessary. A knowledge of facts sufficient to excite the suspicions of a prudent man or woman, and to put him or her on inquiry,

important and leading case, Selden, J., lays down the rule that "where a purchaser has knowledge of any fact sufficient to put him on inquiry as to the existence of some right or title in conflict with that he is about to purchase, he is presumed either to have made the inquiry and ascertained the extent of such prior right, or to have been guilty of a degree of negligence equally fatal to his claim, to be considered as a *bona fide* purchaser." See Hinde v. Vattier, 1 McLean 110; Nantz v. McPherson, 7 Mon. (Ky.) 599; Cotton v. Hart, 1 A. K. Mar. (Ky.) 56; Hawley v. Cramer, 4 Cow. (N. Y.) 718.

[1] Atwood v. Impson, 20 N. J. Eq. 156. See De Witt v. Van Sickle, 29 N. J. Eq. 214; Magniac v. Thompson, 7 Pet. 393; Millholland v. Tiffany, 4 East. Rep. 214; The Holladay Case, 27 Fed. Rep. 830; Clements v. Moore, 6 Wall. 312; Kitch v. St. Louis, K. C. & N. Ry. Co., 69 Mo. 224; Gollober v. Martin, 33 Kans. 255.

[2] 11 Fed. Rep. 361.

[3] Bigelow on Frauds, pp. 288–9.

[4] Compare Cowling v. Estes, 15 Bradw. (Ill.) 260.

[5] 3 Woods 641.

amounts to notice, and is equivalent to actual knowledge in contemplation of law.[1] It has even been held that the means of knowledge, by the use of ordinary diligence, amounts to notice."[2] The judgment in this case was reversed,[3] but upon the very excellent ground that the knowledge of the facts which the wife possessed "rather dispelled than created any suspicion that the husband had a design to defraud his creditors." In Kansas the court say: "If the facts brought to his attention are such as to awaken suspicion, and lead a man of ordinary prudence to make inquiry, he is chargeable with notice of the fraudulent intent, and with participation in the fraud."[4] In Bush v. Roberts,[5] Gray, J., observed: "The action could only prevail by proof" that the purchaser "had actual notice of a fraudulent motive" on the part of the seller "or knowledge of circumstances which was equivalent to such notice. If he knew, or had believed the motives of his vendor to be fraudulent, then, by aiding him in his scheme, he made himself a party to the fraud.[6] But no evidence is competent proof to affect him, or his right to the possession of his property, which falls short of proving the nature of the transaction, and of illustrating the guilty participation of the vendee."

§ 380. — Swayne, J., in delivering the opinion of the United States Supreme Court, said: "A sale may be void for bad faith, though the buyer pays the full value of the property bought. This is the consequence, where his purpose is to aid the seller in perpetrating a fraud upon his creditors, and where he buys recklessly with guilty knowl-

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[1] Citing Atwood v. Impson, 20 N. J. Eq. 150; Tantum v. Green, 20 N. J. Eq. 364; Jackson v. Mather, 7 Cow. (N. Y.) 301; Smith v. Henry, 2 Bailey's (S. C.) Law 118; Mills v. Howeth, 19 Tex. 257.

[2] Citing Farmers' Bank v. Douglass, 19 Miss. 469.

[3] Prewit v. Wilson, 103 U. S. 22.

[4] Gollober v. Martin, 33 Kans. 255.

[5] 111 N. Y. 282.

[6] Citing Parker v. Conner, 93 N. Y. 118.

edge."[1] In a controversy in Alabama[2] it is said that "participation by the grantee may be proved by any circumstances sufficient to charge his conscience with knowledge or notice of the fraudulent designs of the grantor."[3] In a recent Maryland case this language occurs: "All that was necessary to make him take subject to the fraud was sufficient knowledge of the suspicious circumstances to put him on inquiry."[4] In David v. Birchard,[5] where a mortgage was attacked, the court say that "this knowledge need not be actual positive information or notice, but may be inferred from the knowledge of the mortgagee of facts and circumstances sufficient to raise such suspicions as should put him on inquiry." In De Witt v. Van Sickle[6] the court observed: "A person who deals in the avails of a scheme to defraud creditors, to keep what he gets, must not only pay for it, but he must be innocent of any purpose to further the fraud, even to protect himself. Actual notice need not be shown. If the purchaser has before him, at the time of his purchase, facts and circumstances from which a fraudulent intent, either past or present, on the part of the vendor, is a natural and legal inference, or such facts or circumstances of suspicion as would naturally prompt a prudent mind to further inquiry and examination, which, if pursued, would lead necessarily to a discovery of the corrupting facts, he is chargeable with notice."[7] In Prewit v. Wilson[8] the court observed that the grantee to vitiate the transfer "must be *chargeable with knowledge* of the intention of the grantor"; not that explicit and direct proof of actual knowledge must

[1] Clements v. Moore, 6 Wall. 312. Compare Howe Machine Co. v. Claybourn, 6 Fed. Rep. 442.

[2] Hoyt & Bros. Manuf. Co. v. Turner, 84 Ala. 528.

[3] See Hooser v. Hunt, 65 Wis. 71, 79, declining to follow Stearns v. Gage, 79 N. Y. 102, and Parker v. Conner, 93 N. Y. 118.

[4] Biddinger v. Wiland, 67 Md. 362.

[5] 53 Wis. 495. See Millholland v. Tiffany, 4 East. Rep. 214; Green v. Early, 39 Md. 225; Thompson v. Duff, 19 Bradw. (Ill.) 78.

[6] 29 N. J. Eq. 215.

[7] Citing Tantum v. Green, 21 N. J. Eq. 364.

[8] 103 U. S. 24.

be adduced. In Hopkins v. Langton,[1] Chief-Justice Dixon said: "Knowledge by the vendee of the fraudulent intent, or the existence within his knowledge of other facts and circumstances naturally and justly calculated to awaken suspicion of it in the mind of a man of ordinary care and prudence, thus making it his duty to pause and inquire, and a wrong on his part not to do so, before consummating the purchase, is essential in order to charge the vendee. . . . . The vendee cannot shut his eyes, but must look about him and inquire."[2] "Whatever is notice enough to excite attention and put the party on his guard, and call for inquiry, is also notice of everything to which it is afterwards found that such inquiry might have led. When a person has sufficient information to lead him to a fact, he shall be deemed conversant with it."[3] There must be some reason to awaken inquiry and direct diligence in the channel in which it would be successful. That is what is meant by reasonable diligence.[4] "The presumption is that if the party affected by any fraudulent transaction or management might, with ordinary care and attention, have seasonably detected it, he seasonably had actual knowledge of it."[5]

§ 381. — "Means of knowledge are the same thing in effect as knowledge itself,"[6] and "are equivalent to actual knowledge,"[7] is the language employed in some of the

[1] 30 Wis. 381.

[2] In this same case the court had instructed the jury that in order to affect the parties with notice of a fraudulent intent, so as to avoid the sale, they must have "*had before them*" at the time the goods were purchased "*good and substantial evidence of it, such as sends conviction home to the mind and establishes a well-founded belief; nothing short of this would be sufficient to charge them with knowledge.*" The court above said, "A proposition so wide from the true rule of law governing in such case requires no argument to elucidate its error." Hopkins v. Langton, 30 Wis. 382, 383.

[3] Kennedy v. Green, 3 Myl. & K. 719; adopted in Wood v. Carpenter, 101 U. S. 141.

[4] Maule v. Rider, 59 Pa. St. 171. See Wilson v. Hunter, 30 Ind. 472; Cambridge Valley Bank v. Delano, 48 N. Y. 336, 339, 340.

[5] Angell on Limitations, § 187, and note.

[6] Wood v. Carpenter, 101 U. S. 135, 143. See Kurtz v. Miller, 26 Kan. 319.

[7] Dammeyer v. Coleman, 8 Sawyer 51, 58. Citing Manning v. San Jacinto

cases. As applied to our subject at least, it is conceded that these statements are inaccurate, for guilty knowledge would of course defeat the purchaser's title, while the means of knowledge would not have that effect unless the duty to inquire was cast upon him. Again, while a preference would not be avoided under the late bankrupt act, by reason of a mere suspicion of the debtor's insolvency in the mind of the creditor, yet knowledge of facts calculated to produce such a belief in the mind of an ordinarily intelligent man would avoid the security.[1]

It may be urged that some of the citations given are from cases in other branches of the law than that governing fraudulent transfers. This may be true as to a few of the citations, but the mass of the authorities collated directly involved the question of notice of a fraud in an alienation made to defeat creditors. It is submitted that in no department of the law is there greater need for increased facilities to detect and unearth fraud than in that regulating covinous alienations, and therefore the cases illustrating other branches of the law are not irrelevant. Clearly the *dictum* of Miller, J., already quoted, that "circumstances to put the purchaser on inquiry where full value has been paid are not sufficient" notice of fraud, cannot be supported or recognized as against this multitude of authorities.

If the creditor is to be divested of the benefits of the doctrine of constructive notice, as the cases cited seem to indicate, then we contend that facts sufficient to excite inquiry or to put a prudent man upon his guard should raise a presumption of guilty knowledge or constitute

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Tin Co., 7 Sawyer 418; New Albany v. Burke, 11 Wall. 107; Broderick's Will, 21 Wall. 518, 519; Ashhurst's Appeal, 60 Pa. St. 290; Wood v. Carpenter, 101 U. S. 141.

[1] Grant v. National Bank, 97 U. S. 82; Barbour v. Priest, 103 U. S. 297. See Stucky v. Masonic Sav. Bank, 108 U. S. 75; Swan v. Robinson, 5 Fed. Rep. 294; Reber v. Gundy, 13 Fed. Rep. 56; May v. Le Claire, 18 Fed. Rep. 164.

prima facie proof of actual notice of the fraudulent design, which, in the absence of satisfactory explanation, should be conclusive. Constructive notice in this connection may be likened to the rule still prevailing in some States, to the effect that a failure to effect a change of possession on a sale of personalty is conclusively presumed to be fraudulent as to creditors. The doctrine which we advance is akin to the common and generally prevalent doctrine that continued possession on the part of the vendor is *prima facie* fraudulent, that is, raises a presumption which may be explained or rebutted.[1]

§ 382. **Actual belief.**—There is another view, already outlined in part, to be taken of this question. In New York fraud, in cases of alienations to defeat creditors, is "deemed a question of fact and not of law."[2] In Coleman v. Burr[3] the claim was made that there was no finding by the referee of a fraudulent intent; but that on the contrary *he had found the whole transaction to be fair and honest.* The court, however, observed that as the referee has "found facts from which the inference of fraud is inevitable, and although he has characterized the transactions as honest and fair, that does not make them innocent nor change their essential character in the eye of the law." The assignor "must be deemed to have intended the natural and inevitable consequences of his acts, and that was to hinder, delay, and defraud his creditors." There is nothing novel or unusual in this case. The principle it enforces is founded in public policy, and is very frequently applied.[4] It will be seen at a glance that under this rule a fraudulent intention can be conclusively fastened upon the debtor when no such wrongful motive was present in his mind, and he was as free from the design to defraud as our first parents were of knowledge of sin before tasting the forbidden fruit. From the ne-

[1] See Chap. XVII.
[2] 2 N. Y. R. S. 137, § 4.
[3] 93 N. Y. 31.
[4] See §§ 8, 9.

cessity of the case the substituted fraudulent intent prevails, because experience from which the rule springs has shown that transactions where this presumption obtains, hinder and defraud creditors in enforcing payment of their claims. The difficulty of proving other than by circumstantial evidence, that a vendee had actual knowledge of the vendor's fraud, or participated therein, is manifest.[1] The law labels certain facts and combinations of circumstances as being sufficient to excite inquiry and suspicion on the part of a purchaser, and supplements this by asserting that in certain cases means of knowledge are the same thing as knowledge itself.[2] The principle of imputing a fraudulent intent to an innocent debtor is frequently invoked. Is there any legal absurdity or moral wrong in imputing it to a vendee? Do not the necessities of the case often demand it?[3] It is respectfully contended that the test, "whether the vendee did in fact know or believe that the vendor intended to defraud his creditors,"[4] would furnish a very uncertain and fluctuating standard, and would not in fact constitute a general rule of any utility. The intellectual and moral perceptions are stronger or weaker in different men, according to their natures and education, and a man morally obtuse might look upon a transaction as honest which to the average person would appear to be manifestly unfair or fraudulent. We have seen that a man may commit a fraud without believing it to be a fraud.[5]

§ 383. **Purchaser with notice.**—It is manifest that one purchasing of the fraudulent grantee, with notice of the prior fraud, takes the title subject to all the infirmities with which it was affected in the hands of his grantor. To hold otherwise would be equivalent to saying that *three* conspiring together might accomplish a fraud which would be im-

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[1] See §§ 5, 6.

[2] Wood v. Carpenter, 101 U. S. 135, 143.

[3] See §§ 9, 10.

[4] Parker v. Conner, 93 N. Y. 118, 126.

[5] See § 8.

possible to two.[1] Purchasers *pendente lite* are bound by the result of the litigation.[2]

§ 384. **Purchaser with notice from bona fide purchaser.**—It is a well-settled rule in equity that a purchaser with notice himself from a *bona fide* purchaser for a valuable consideration, who bought without notice, may protect himself under the first purchaser.[3] The only exception to this rule is where the estate becomes revested in the original party to the fraud, in which case the original equity will re-attach to it in his hands.[4] A volunteer with notice, who derives his title from a *bona fide* purchaser for value without notice, is unaffected by the fraudulent character of the original transaction. This is necessarily the case; otherwise the party holding the perfect title might be unable to dispose of it, and its value would be greatly impaired. The party purchasing with notice recovers in the right of his vendor.[5]

§ 385. **Fraudulent grantee as trustee.**—Elliott, J., observed in a recent case in the Supreme Court of Indiana, that "where property is fraudulently conveyed, the grantee holds it as trustee for the creditors of the grantor."[6] In Blair v. Smith[7] the court said: "Mrs. Smith received the money as trustee, and as such must account for it. If she had received a stock of goods from her husband pursuant to a corrupt scheme to defraud his creditors, she certainly could have been charged as trustee. The fact that she received one species of property rather than another can make no difference. The governing principle is the same, no

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[1] Wilcoxen v. Morgan, 2 Col. 478.

[2] Tilton v. Cofield, 93 U. S. 168; Allen v. Halliday, 28 Fed. Rep. 263.

[3] Allison v. Hagan, 12 Nev. 55; 2 Fonb. Eq. 149; 1 Story's Eq. Jur. 409.

[4] 1 Story's Eq. Jur. § 410; Church v. Church, 25 Pa. St. 278. See Oliver v. Piatt, 3 How. 401; Johnson v. Gibson, 116 Ill. 294.

[5] See Fulton v. Woodman, 54 Miss. 158; Goshorn v. Snodgrass, 17 W. Va. 717.

[6] Buck v. Voreis, 89 Ind. 117; Blair v. Smith, 114 Ind. 125.

[7] 114 Ind. 114, 125.

matter what kind of property the fraudulent participant in the positive wrong receives. Mr. Pomeroy asserts, what is well known to be the law, that a fraudulent grantee takes as trustee, and says: 'The lien upon the original articles will extend to the resulting fund or the substituted goods.'"[1]

§ 386. **Title from fraudulent vendee.**—It was at one time sought to establish the rule, at least in some of the authorities, that a *bona fide* purchaser from a fraudulent grantee, was not entitled to protection against the claims of the creditors of the fraudulent grantor.[2] The argument in support of this doctrine was to the effect that by the very terms of the statute against fraudulent transfers, the conveyance was pronounced utterly void, frustrate, and of no effect, and consequently a subsequent conveyance from the fraudulent grantee could have no foundation on which to rest. So, also, it was contended that it was against the policy of the statute to afford protection to a subsequent purchaser from the fraudulent grantee, though he parted with value, in ignorance of any infirmity in the title he was acquiring. Quoting the words of Chancellor Kent: "Though the debtor himself may fraudulently, on his own part, convey to a *bona fide* purchaser, for a valuable consideration, yet his fraudulent grantee cannot; for it is understood that the proviso in the 13 Eliz. does not extend to such subsequent conveyance. The policy of that act would be defeated by such extension. Its object was to secure creditors from being defrauded by the debtor; and the danger was, not that he would honestly sell for a fair price, but that he would fraudulently convey, upon a secret trust between him and the grantee, at the expense of the creditors. If the debtor sells, himself, in a case where the creditor has no

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[1] Citing Pomeroy's Equity Jur., vol. 3, § 1291.

[2] Roberts v. Anderson, 3 Johns. Ch. (N. Y.) 371; Preston v. Crofut, Conn. 527, note; Hoke v. Henderson, 3 Dev. (N. C.) Law 12; Thames v. Rembert, 63 Ala. 570.

lien, and sells for a valuable consideration, he acquires means to discharge his debts; and it may be presumed he will so apply them. If his fraudulent grantee be enabled to sell, the grantor cannot call those proceeds out of his hands, and the grantee can either appropriate them to his own use, or to the secret trusts upon which the fraudulent conveyance was made. There is more danger of abuse, and that the object of the statute would be defeated, in the one case than in the other."[1] The decree of Chancellor Kent was reversed on error;[2] and it was dissented from and the contrary doctrine held by Judge Story, in Bean v. Smith,[3] and now in nearly if not all the States, the doctrine is settled, that a fraudulent conveyance will not, at the instance of the creditors, be vacated to the prejudice of an innocent purchaser from the fraudulent grantee.[4]

§ 387. **Creditors of fraudulent grantee.**—In Susong v. Williams[5] the court held that where a conveyance was made by a mother to her son upon a secret trust to reconvey to the grantor when peace should be re-established, the motive of the grantor in making the conveyance being fear of confiscation, the conveyance was valid between the parties, and the reconveyance, being without consideration, was void as to the creditors of the son. This is based upon the principle that the grantor by making this conveyance to her son, valid and effectual on its face, and permitting it to be recorded, thereby held her son out to the world as the owner of the property whereby he was enabled to obtain credit. The principles of this case would seem to render it unsafe for any owner of property to allow the title of it for any cause to rest in another person. Certainly it behooves the

[1] Roberts v. Anderson, 3 Johns. Ch. (N. Y.) 371, 378.

[2] Anderson v. Roberts, 18 Johns. (N. Y.) 515.

[3] 2 Mason 252.

[4] See note to Basset v. Nosworthy, 2 Lea. Cas. in Eq. (4th Am. ed.) 42; Bump on Fraud. Conv. 480–90; 4 Kent 464; Young v. Lathrop, 67 N. C. 63; s. c. 12 Am. Rep. 603; Gordon v. Ritenour, 87 Mo. 61.

[5] 1 Heisk. (Tenn.) 625.

fraudulent debtor to exercise care and good judgment in selecting a vendee who not only will consummate the secret trust, but who will not be frustrated in so doing by his own creditors. This doctrine of apparent ownership may be variously illustrated. In Budd v. Atkinson[1] it appeared that a father bought a farm and caused it to be conveyed to his son by a deed which was recorded. The son entered into possession of the property and lived upon it. Subsequently he contracted debts on the credit of his ownership of the farm. Then at his father's request he conveyed the property to the father, without consideration, and upon the ground that the latter had never intended to give the farm to him, and that the son was not aware that the conveyance had been made to him. The court held that the deed to the father was fraudulent as against the son's creditors.[2] Where, however, a fraudulent mortgagee reconveys the land to the fraudulent mortgagor, before any lien attaches in favor of the creditors of the former, they cannot subject the land to the payment of their debts.[3]

§ 388. **Liability between fraudulent grantees.**—In Riddle v. Lewis[4] the court decided that fraudulent grantees, as between themselves incur no responsibility to one another by permitting the grantor to have or dispose of any part of the property conveyed.

§ 389. **Fraudulent grantee sharing in recovery.**—Where a fraudulent scheme or purchase, under which a creditor obtained property of an insolvent debtor, is set aside in a suit brought by another creditor against the fraudulent vendee,

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[1] 30 N. J. Eq. 530.

[2] Where a fund arising from property fraudulently assigned has been brought into court at the instance of creditors of the vendor, creditors of the fraudulent vendee will not be permitted to have satisfaction of their claims out of it until all the creditors of the vendor who have come in (although after the creditors of the fraudulent vendee) are fully paid. Mullanphy Sav. Bank v. Lyle, 7 Lea (Tenn.) 431.

[3] Powell v. Ivey, 88 N. C. 256. See § 398.

[4] 7 Bush (Ky.) 193.

the latter will not be allowed to share with the complainant in the proceeds of the property.[1] But, as we have shown, where an illegal preference is set aside, the creditor who attempted to secure such preference is not necessarily thereby debarred from participating in a distribution of the debtor's property under a voluntary assignment act, including the property thus illegally conveyed to him.[2]

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[1] Smith v. Craft, 11 Biss. 351; Wilson v. Horr, 15 Iowa 493. See Riggs v. Murray, 2 Johns. Ch. (N. Y.) 582; Murray v. Riggs, 15 Johns. (N. Y.) 571; Harris v. Sumner, 2 Pick. (Mass.) 129.

[2] White v. Cotzhausen, 129 U. S. 329.

CHAPTER XXV.

PREFERENCES.

§ 390. Preferences legal.
391. Must represent actual debt.
392. Vigilant creditors.
392*a*. Preferences in New York for wages.
393. Compromises—Secret preferential agreements.
394. Secret antecedent agreement to prefer.

"Equity delights in equality."

§ 390. **Preferences legal.**—In the absence of a bankrupt act, the principle prevails in most of the States that an insolvent debtor may make preferences among his creditors,[1] even to the extent of transferring all his property to one creditor to the exclusion of the others.[2] The common law

[1] Smith v. Craft, 11 Biss. 347; Swift v. Hart, 35 Hun (N. Y.) 130, citing this section; Leavitt v. Blatchford, 17 N. Y. 537; Warren v. Jones, 68 Ala. 449; Crawford v. Kirksey, 55 Ala. 282; Shealy v. Edwards, 75 Ala. 418; Bishop v. Stebbins, 41 Hun (N. Y.) 246; Osgood v. Thorne, 63 N. H. 375; Low v. Wortman, 44 N. J. Eq. 202; Walden v. Murdock, 23 Cal. 550; Giddings v. Sears, 115 Mass. 505; Ferguson v. Spear, 65 Me. 279; French v. Motley, 63 Me. 328; Forrester v. Moore, 77 Mo. 651; Clark v. Krause, 2 Mackey (D. C.) 567; Richardson v. Marqueze, 59 Miss. 80; Eldridge v. Phillipson, 58 Miss. 270; Jewett v. Noteware, 30 Hun (N. Y.) 194; Totten v. Brady, 54 Md. 170; Preusser v. Henshaw, 49 Iowa 41; Atlantic Nat. Bank v. Tavener, 130 Mass. 407; Savage v. Dowd, 54 Miss. 728; Shelley v. Boothe, 73 Mo. 74; Spaulding v. Strang, 37 N. Y. 135; Auburn Exchange Bank v. Fitch, 48 Barb. (N. Y.) 344; Allen v. Kennedy, 49 Wis. 549; Keen v. Kleckner, 42 Pa. St. 529; Jordan v. White, 38 Mich. 253; Murphy v. Briggs, 89 N. Y. 451; Hill v. Bowman, 35 Mich. 191; Smith v. Skeary, 47 Conn. 47; Frazer v. Thatcher, 49 Tex. 26; Holbird v. Anderson, 5 T. R. 235; Estwick v. Caillaud, 5 T. R. 420; Goss v. Neale, 5 Moore 19. The law tolerates preferences. Burr v. Clement, 9 Col. 1.

[2] Richardson v. Marqueze, 59 Miss. 80.

Purpose of bankrupt act.—The great object of the late Bankrupt Act, so far as creditors were concerned, was to secure equality of distribution of the bankrupt's property among them. It set aside transactions had within four or six months prior to the bankruptcy, depending upon their character, defeating or tending to defeat such distribution. See Mayer v. Hellman, 91 U. S. 501.

favors and rewards the vigilant and active creditor. The right of a debtor under the rules of the common law to devote his whole estate to the satisfaction of the claims of particular creditors, results, as Chief-Justice Marshall declares, "from that absolute ownership which every man claims over that which is his own."[1] If, while a man retains his property in his own hands, the right of giving preferences should be denied, he would so far lose the dominion over his own that he could not pay *anybody*, because whoever he paid would receive a preference.[2] It makes no difference that the creditor and debtor both knew that the effect of the application of the insolvent's estate to the satisfaction of the particular claim would be to deprive other creditors of the power to reach the debtor's property by legal process or enforce satisfaction of their claims.[3] If there is no secret trust agreed upon or understood between the debtor and creditor in favor of the former, but the sole object of a transfer of property is to pay or secure the payment of a debt, the transaction is a valid one at common law.[4] The distinction is between a transfer of property made solely by way of preference of one creditor over others, which is legal, and a similar transfer made with a design to secure some benefit or advantage from it to the debtor.[5] It is an absurdity to say that a conveyance of property which pays one creditor a just debt and nothing more, is fraudulent as against other creditors of the common debtor.[6] In a fair race for preference if a

[1] Brashear v. West, 7 Pet. 608, 614; Reed v. McIntyre, 98 U. S. 510; Mayer v. Hellman, 91 U. S. 500; Campbell v. Colorado Coal & Iron Co., 9 Col. 65.

[2] Tillou v. Britton, 9 N. J. Law 120, cited in Campbell v. Colorado Coal & Iron Co., 9 Col. 65.

[3] Wood v. Dixie, 7 Q. B. 892.

[4] In Smith v. Craft, 123 U. S. 436, it was held that a bill of sale of a stock of goods in a shop, by way of preference of a *bona fide* creditor, was not rendered fraudulent against other creditors as matter of law by containing a stipulation that the purchaser should employ the debtor at a reasonable salary to wind up the business.

[5] Banfield v. Whipple, 14 Allen (Mass.) 13; Giddings v. Sears, 115 Mass. 507.

[6] Auburn Exchange Bank v. Fitch, 48 Barb. (N. Y.) 354.

creditor by diligence secures an advantage, it may be maintained; but if his purpose is not to collect the claim, but to help the debtor cover up his property, he cannot shield himself by showing that his debt was *bona fide*.[1] We may here observe that an insolvent debtor may prefer his daughters to the extent that they are his creditors as his wards, although such preference may leave the debtor without the means of paying his other debts.[2] In a controversy recently before the Supreme Court of the United States,[3] construing the statute of Illinois, it was decided that a preferential disposition of all the assets of an insolvent debtor operated as a general assignment. The decree appealed from entirely excluded the preferred creditors from participating in the fund. In modifying this decree Mr. Justice Harlan said: "The mother, sisters, and brother of Alexander White, Jr., were his creditors, and, so far as the record discloses, they only sought to obtain a preference over other creditors. But their attempt to obtain such illegal preference ought not to have the effect of depriving them of their interest, under the statute, in the proceeds of the property in question, or justify a decree giving a prior right to the appellee. It was not intended, by the statute, to give priority of right to the creditors who are not preferred. All that the appellee can claim is to participate in such proceeds upon terms of equality with other creditors."

§ 391. **Must represent actual debt.**—The preferred creditor must have a valid subsisting claim against the debtor which the transfer was given to satisfy or secure. In Union National Bank v. Warner[4] the conveyance was made by a father to his sons, who were, however, not creditors. The mutual fraudulent intent being shown, the

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[1] Smith v. Schwed, 9 Fed. Rep. 483. See David v. Birchard, 53 Wis. 494; Menton v. Adams, 49 Cal. 620.

[2] Micou v. National Bank, 104 U. S. 543.

[3] White v. Cotzhausen, 129 U. S. 345.

[4] 12 Hun (N. Y.) 306.

conveyance was annulled, their agreement to pay some of his debts being deemed a part of the fraudulent scheme which fell with it. So in Davis v. Leopold,[1] the conveyance by a husband through a third person to his wife was set aside, the wife not being a creditor;[2] while in Crowninshield v. Kittridge[3] a mortgage was annulled because it was given for a fictitious or excessive amount, and executed for the double purpose of securing a *bona fide* debt and preventing creditors from attaching the property.

§ 392. **Vigilant creditors.** — The general rule in equity only requires that the fund acquired by a creditors' proceeding should be distributed among the creditors *pro rata*.[4] And where a creditor has not obtained any lien at law, not having obtained any judgment, he is not entitled to a priority over the other creditors.[5] The commencement of a creditor's suit in chancery by a judgment-creditor, with execution returned unsatisfied, gives him a lien upon all the equitable assets of the debtor,[6] and the same general rule is applied to supplementary proceedings.[7] The first party to move is rewarded as a vigilant creditor, the commencement of his suit being regarded as an actual levy upon the equitable assets of his debtor,[8] and entitles him to a priority.[9] A purchaser *pendente lite* with notice, will take subject to the rights of the complainant.[10] "The

[1] 87 N. Y. 620.

[2] Compare Jewett v. Noteware, 30 Hun (N. Y.) 194.

[3] 7 Met. (Mass.) 522.

[4] Robinson v. Stewart, 10 N. Y. 196.

[5] Ibid.

[6] Storm v. Waddell, 2 Sandf. Ch. (N. Y.) 494; Brown v. Nichols, 42 N. Y. 26. Examine Freedman's Savings & Trust Co. v. Earle, 110 U. S. 710; Safford v. Douglas, 4 Edw. Ch. (N. Y.) 538; Boynton v. Rawson, 1 Clarke Ch. (N. Y.) 592; Hone v. Henriquez, 13 Wend. (N. Y.) 244; Voorhees v. Seymour, 26 Barb. (N. Y.) 580.

[7] Edmonston v. McLoud, 16 N. Y. 544. See § 61.

[8] Lynch v. Johnson, 48 N. Y. 33; The Deposit Nat. Bank v. Wickham, 44 How. Pr. (N. Y.) 422; Roberts v. Albany & W. S. R.R. Co., 25 Barb. (N. Y.) 662; Field v. Sands, 8 Bosw. (N. Y.) 685.

[9] George v. Williamson, 26 Mo. 190; 2 Hoffman's Ch. Pr. 114; Corning v. White, 2 Paige (N. Y.) 567.

[10] Jeffres v. Cochrane, 47 Barb. (N. Y.) 557.

vigilant creditor, pursuing his claim, acquires a preferable equity, which attaches and becomes a specific lien by the filing of his bill."[1] This right is said to be as well defined and as exclusive of the claims of other creditors as is the right secured by a judgment lien upon the debtor's property.[2] Where a party purchased lands pending a suit to reach the judgment-debtor's interest therein, and entered into possession and made improvements, such a grantee is not entitled to have his improvements discharged from the lien of the decree rendered against the lands.[3] Equity will not relieve a party from a risk which he voluntarily assumes. This is a phase of the general rule that no allowance will be made for improvements placed upon land after suit brought.[4] The Court of Chancery does not, however, give any specific lien to a creditor at large, against his debtor, further than he has acquired at law. It is only when he has obtained a judgment and execution in seeking to subject the property of his debtor in the hands of third persons, or to reach property not accessible to an execution, that a legal preference is acquired which a Court of Chancery will enforce.[5] In New York "the law gives no preference to a vigilant creditor in the estate of a decedent."[6]

§ 392*a*. **Preferences in New York for wages.**—By statute in New York[7] it is provided that, in all assignments made pursuant to the act, the wages or salaries of employés shall be preferred before any other debt. The Court of Appeals held that an assignment was not rendered void by reason of the omission to insert therein a clause giving such pref-

[1] Burt v. Keyes, 1 Flippin 72. See Douglass v. Huston, 6 Ohio 156; Miers v. Zanesville & M. Turnpike Co., 13 Ohio 197; Corning v. White, 2 Paige (N. Y.) 567; George v. Williamson, 26 Mo. 190; Albany City Bank v. Schermerhorn, 1 Clarke's Ch. (N. Y.) 297; Storm v. Waddell, 2 Sandf. Ch. (N. Y.) 494.

[2] Burt v. Keyes, 1 Flippin 72.

[3] Patterson v. Brown, 32 N. Y. 81.

[4] Sedgwick & Wait on Trial of Title to Land, 2d ed., § 705.

[5] Day v. Washburn, 24 How. 355.

[6] Lichtenberg v. Herdtfelder, 103 N. Y. 306.

[7] Laws of 1877, Ch. 466, § 29, as amended by Laws of 1884, Chap. 328.

erence, as the instrument would be read in connection with the statute with the same effect as though the provision formed a part of it.[1]

§ 393. Compromises—Secret preferential agreements.—The law has ever scrupulously guarded the integrity and good faith required in the general compromises of creditors with their debtors. From considerations of public policy and sound morals, transactions of this character should be conducted with truth and fairness, lest any undue secret advantage be secured to one creditor at the expense of another.[2] Attempts to thwart the application of these salutary principles are common and when detected will be overthrown.[3] In Cockshott v. Bennett,[4] the defendants being indebted to plaintiffs and other creditors, a compromise was effected at 11*s.* in the pound as to all the creditors except plaintiffs, who refused to sign the deed unless the defendants gave them a note for the remaining 9*s.* in the pound. The note was accordingly given, and defendants made a subsequent promise to pay it. Lord Kenyon in defeating a recovery placed his opinion upon the foundation that the note was a fraud upon the creditors who were parties to the deed by which their debts were to be cancelled in consideration of receiving 11*s.* in the pound, and observed that "all the creditors being assembled for the purpose of arranging the defendants' affairs, they all undertook and mutually contracted with each other that the defendants should be discharged from their debts after the execution of the deed." Upon the point, as to the revival of the debt by a subsequent promise, the learned Chief-Justice said: "Contracts not founded on immoral considerations may be revived. . . . . But this transaction is

[1] Richardson v. Thurber, 104 N. Y. 606.

[2] Fenner v. Dickey, 1 Flippin 36. The debtor seeking a composition is not bound unless requested to make disclosures concerning his property. Graham v. Meyer, 99 N. Y. 611.

[3] Bliss v. Matteson, 45 N. Y. 22.

[4] 2 T. R. 763.

bottomed in fraud, which is a species of immorality, and not being available as such, cannot be revived by a subsequent promise." Mr. Justice Ashurst remarked in the same case that the creditors "were induced to enter into the agreement on principles of humanity in order to discharge the defendants from their incumbrances; and if they had not thought that such would have been the effect, they would not probably have agreed to sign the deed, but each would have endeavored to obtain payment of his whole debt. Therefore I think that this security is not merely voidable, but absolutely void. . . . . The note was void on the ground of *fraud*, and any subsequent promise must be *nudum pactum*." So in Jackson v. Lomas,[1] a secret agreement was made by a debtor with a creditor to pay an additional sum, the consideration of which agreement was that the creditor should sign a composition deed with the other creditors. Mr. Justice Buller declared the secret agreement absolutely void, and refused to enforce it.[2] The principle of these English cases is upheld in the early case of Payne v. Eden,[3] in New York, where a note given in consideration of the creditors signing the insolvent's petition to make up the statutory proportion was adjudged void. And in Wiggin v. Bush,[4] a note executed by a debtor to his creditor, to induce him to withdraw his opposition to the debtor's discharge under an insolvent law was adjudged void. So a note given by a third person to a creditor in consideration of his withdrawing all opposition to the discharge of his debtor as a bankrupt, even though without the knowledge of the debtor, is void.[5] In Case v.

[1] 4 T. R. 166.

[2] See Jones v. Barkley, 2 Doug. 696; Sumner v. Brady, 1 H. Bla. 647; Jackson v. Duchaire, 3 T. R. 551; Feise v. Randall, 6 T. R. 146; Leicester v. Rose, 4 East 372; Holmer v. Viner, 1 Esp. 131; Knight v. Hunt, 5 Bing. 432; Howson v. Hancock, 8 T. R. 575; Solinger v. Earle, 82 N. Y. 393.

[3] 3 Caines (N. Y.) 213.

[4] 12 Johns. (N. Y.) 306.

[5] Bell v. Leggett, 7 N. Y. 176. See Waite v. Harper, 2 Johns. (N. Y.) 386; Tuxbury v. Miller, 19 Johns. (N. Y.) 311; Drexler v. Tyrrell, 15 Nev. 132; York v. Merritt, 77 N. C. 214; Sharp v. Teese, 9 N. J. Law 352.

Gerrish,[1] Chief-Justice Shaw, in deciding upon an agreement of this character where a note had been given, said: "This was an unwarrantable coercion upon the debtor, and a fraud upon the other creditors, which renders the note void."

§ 394. **Secret antecedent agreement to prefer.**—An agreement between a debtor and creditor that, in consideration of receiving a loan, the debtor will prefer such creditor in the event of insolvency, has been considered to be in the nature of a secret lien, which is a fraud upon subsequent creditors of the debtor who are ignorant of the arrangement, and a subsequent disposition of the property in accordance with such an arrangement can be avoided by such subsequent creditors.[2] We doubted the soundness of this conclusion in our first edition, and the case cited has since been overturned[3] and its conclusions departed from.[4] In National Park Bank v. Whitmore,[5] Earl, J., said: "A debtor may obtain credit by a promise to pay in the future, either in cash or in property, or by promising to give his check or an indorsed note, or a confession of judgment. Neither such a promise, nor its performance, is a legal fraud upon any one; and why may he not promise to give security upon the property purchased, or other property? Such a promise, honest in fact, has never been held to be a fraud or to work a fraud upon creditors. Security honestly given in pursuance of such a promise, relates back to the date of the promise, and, except as to intervening rights, is just as good and effectual as if given at the date of the promise; and it has generally been so held, even in bankruptcy proceedings.[6] But here the agreement was to make

[1] 15 Pick. (Mass.) 49.

[2] Smith v. Craft, 11 Biss. 340.

[3] 17 Fed. Rep. 705.

[4] See National Park Bank v. Whitmore, 104 N. Y. 304, and cases cited.

[5] 104 N. Y. 303.

[6] Citing Bump's Bankruptcy [10th ed.] 821; Forbes v. Howe, 102 Mass. 427; Bank of Leavenworth v. Hunt, 11 Wall. 391; Burdick v. Jackson, 7 Hun (N. Y.) 488; *Ex parte* Ames, 1 Lowell's Dec. 561; *Ex parte* Fisher, L. R.

the preferential assignment in case it became necessary to protect the creditor; and it is further claimed that such a conditional agreement is a fraud upon other creditors. A failing debtor may make an assignment preferring one or more creditors because he is under a legal, equitable, or moral obligation to do so, or he may do it from mere caprice or fancy, and the law will uphold such an assignment honestly made. If he may make such an assignment without any antecedent promise, why may he not make it after and in pursuance of such a promise? How can an act otherwise legal be invalidated because made in pursuance of a valid or invalid agreement honestly made? In Smith v. Craft[1] Judge Gresham held that such a conditional agreement for a future preference was a fraud upon creditors. But in the same case[2] upon a rehearing, Judge Woods held that the same agreement was not fraudulent, and in a very satisfactory opinion showed that such an agreement as we have here, for a future preference in case of insolvency, is not a legal fraud upon creditors.[3] This agreement did not create any lien, legal or equitable, upon the property of the defendants. It was not an agreement for a future lien upon the specific property, which is sometimes held to create an equitable lien which may be enforced in equity. It was not an agreement for any lien at all. It was simply an agreement, in case of an assignment by the defendants, to prefer Whiting. The agreement did not bind defendants' property, nor encumber it, but left it subject to all the remedies of their creditors, and it neither hindered nor delayed those creditors. They could have made the same assignment without a previous agreement

7 Ch. App. 636; *Ex parte* Kilner, L. R. 13 Ch. Div. 245; Mercer v. Peterson, L. R. 2 Ex. 304; s. c. L. R. 3 Ex. 104.

[1] 11 Biss. 340.

[2] 17 Fed. Rep. 705.

[3] Citing Walker v. Adair, 1 Bond 158; Anderson v. Lachs, 59 Miss. 111; Spaulding v. Strang, 37 N. Y. 135; s. c. 38 N. Y. 9; Haydock v. Coope, 53 N. Y. 68.

and it is impossible to perceive how the agreement worked any legal harm to any one. It is not important to determine whether this was an agreement of which a court of equity would enforce specific performance, but we do not believe it was, and think it must stand both in law and equity like an agreement to pay at a future day."

CHAPTER XXVI.

CONVEYANCES VALID BETWEEN THE PARTIES—RELIEF TO DEFRAUDED GRANTORS.

§ 395. Conveyances binding between the parties.
396. The theory—No reconveyance.
397. Massachusetts cases.
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§ 401. The cases just considered exceptional.
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§ 395. **Conveyances binding between the parties.**—The statute under which fraudulent and voluntary conveyances may be set aside, 13 Eliz. c. 5, ordinarily has no application to the parties to such instruments or their representatives. In Jackson v. Garnsey,[1] Spencer, C. J., in referring to this subject, used these words: "As between the parties they are expressly excluded from its operation, and are left as they stood at the common law; and before the statute the heir could never set up his title against the voluntary alienee of his ancestor, nor call upon him for contribution, where both were amenable to the creditors of the ancestor as tertenants; nor will courts of equity assist the party making a voluntary conveyance or his representative claiming as such, by setting them aside." The cases holding such conveyances binding between the parties are numerous.[2] The

[1] 16 Johns. (N. Y.) 189. See §§ 112, 113, 121.

[2] See Mercer v. Mercer, 29 Iowa 557; Tantum v. Miller, 11 N. J. Eq. 551; Bonesteel v. Sullivan, 104 Pa. St. 9; Lerow v. Wilmarth, 9 Allen (Mass.) 386; Bullitt v. Taylor, 34 Miss. 708, 737; Armington v. Rau, 100 Pa. St. 168; Haak's Appeal, 100 Pa. St. 62; Doe *d.* Abbott v. Hurd, 7 Blackf. (Ind.)

same rule appertains to general assignments which, though voidable by creditors, are always valid between the immediate parties.[1] The conveyance, as between the parties, stands upon the same ground as if a full and adequate consideration had been paid.[2] It is held in conformity with this rule that a debtor who has conveyed his property in order to defraud his creditors has no standing in a court of equity to question the fairness or adequacy of price ob-

510; McGuire v. Miller, 15 Ala. 394, 397; Williams v. Higgins, 69 Ala. 523; Dyer v. Homer, 22 Pick. (Mass.) 253; Keel v. Larkin, 83 Ala. 142; Tyler v. Tyler, 25 Ill. App. 343; Songer v. Partridge, 107 Ill. 529; Barrow v. Barrow, 108 Ind. 345; Reichart v. Castator, 5 Binn. (Pa.) 109; S. C. 6 Am. Dec. 402, and note; Newell v. Newell, 34 Miss. 385; Shaw v. Millsaps, 50 Miss. 380; Davis v. Swanson, 54 Ala. 277; Noble v. Noble, 26 Ark. 317; Lloyd v. Foley, 6 Sawyer 426; Van Wy v. Clark, 50 Ind. 259; Crawford v. Lehr, 20 Kans. 509; Peterson v. Brown, 17 Nev. 173; Allison v. Hagan, 12 Nev. 38; Stewart v. Platt, 101 U. S. 738; Harmon v. Harmon, 63 Ill. 512; Graham v. Railroad Co., 102 U. S. 148; George v. Williamson, 26 Mo. 190; Sharpe v. Davis, 76 Ind. 17; Nichols v. Patten, 18 Me. 231; Ellis v. Higgins, 32 Me. 34; Bush v. Rogan, 65 Ga. 321; Goodwyn v. Goodwyn, 20 Ga. 600; McCleskey v. Leadbetter, 1 Ga. 551. In Barrow v. Barrow, 108 Ind. 345, it was held that where a wife joined her husband in conveying his land in fraud of creditors, she could not, after obtaining a divorce, have the conveyance set aside, and the land subjected to the payment of her judgment for alimony.

[1] Ames v. Blunt, 5 Paige (N. Y.) 13; Mills v. Argall, 6 Paige (N. Y.) 577; Smith v. Howard, 20 How. Pr. (N. Y.) 121, 126; Bradford v. Tappan, 11 Pick. (Mass.) 76; Van Winkle v. McKee, 7 Mo. 435; Bellamy v. Bellamy, 6 Fla. 62; Rumery v. McCulloch, 54 Wis. 565. See Chap. XXI.

[2] Chapin v. Pease, 10 Conn. 73.

Relaxation of the rule.—Bowes v. Foster, 2 H. & N. 779, seems to evidence an intention to relax this salutary rule. Plaintiff being in financial difficulties, and fearing proceedings on the part of his creditors, made an agreement with defendant, who was also a creditor, that a pretended sale of a stock of goods should be made to defendant. An invoice was prepared, a receipt given for the purchase-money, and possession delivered to the defendant. The latter sold the goods as his own. Plaintiff brought trover and was permitted to recover upon the theory that the transaction never was in reality a sale. Pollock, C. B., said: "I am by no means sure that a man who, under the pressure of distress and misfortune, lends himself to such a transaction, is in the same *delictum* as a man who does so without such motive." Still more remarkable is the statement of Martin, B., who observed: "It is said that a person ought not to be allowed to set up his own fraud. But here there was no fraud; it was only intended to give the defendant the power to pretend that he was the owner of the goods." If observations such as these are to pass unchallenged the principle of law for which we are contending would be practically nullified.

tained at the public sale of the premises under a creditor's bill to reach such property.[1] It is not material whether the party is alleging the fraud as matter of defense, or as a ground of action,[2] for, as was said by Lord Mansfield,[3] "no man shall set up his own iniquity as a *defense*, any more than as a cause of action."[4]

§ 396. **The theory—No reconveyance.**—Lord Chancellor Thurlow[5] declared his opinion to be that in all cases where money was paid for an unlawful purpose the party, though *particeps criminis*, might recover at law; and the reason was that if courts of justice meant to prevent the perpetration of crimes it must be, not by allowing a man who has possession to hold it, but by putting the parties back in the condition in which they were before entering into the transaction. The doctrine of the learned Lord Chancellor would seem to be sufficiently broad to cover the cases of conveyances made in fraud of creditors. Yet the authorities, as a general rule, reveal a singular absence of any disposition on the part of the courts to extend relief to fraudulent grantors. A fraudulent vendee is under no legal obligation to reconvey, though morally bound to do so; and a court of equity will give no aid where both the vendor and vendee participate in the illegal transaction.[6] It is familiar learning that equity will not decree a specific

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[1] Guest v. Barton, 32 N. J. Eq. 120.

[2] Williams v. Higgins, 69 Ala. 523.

[3] Montefiori v. Montefiori, 1 W. Bla. 364.

[4] "As between the grantor and grantees the conveyances made were good and passed title to the property. And as to the creditors of the grantor they were not void, but merely voidable at their option; they, by proper proceedings, could have them set aside, but if no steps were taken by them for such purpose, then undoubtedly the title of the grantees would be and remain indisputable." McMaster v. Campbell, 41 Mich. 516. Whenever it appears that the object of a suitor in filing a creditor's bill is to aid a person who has placed his property in the name of another to hinder creditors to regain control of it, equity will refuse assistance. Ruckman v. Conover, 37 N. J. Eq. 583.

[5] See Neville v. Wilkinson, 1 Bro. C. C. 547.

[6] Powell v. Ivey, 88 N. C. 256; s. c. 28 Alb. L. J. 254.

performance of an agreement by the fraudulent grantee to reconvey the property to the debtor,[1] and will not interfere to correct a mistake in a deed that was executed for a fraudulent purpose.[2] And if a party obtains a deed without consideration upon a parol agreement that he will hold the land in trust for the grantor, there is authority to the effect that such trust will not be enforced, as it would violate the statute of frauds, and also the general rule that parol evidence cannot be admitted to vary, add to, or contradict a written instrument.[3] In a New Jersey case[4] it was decided that a note which was given for property transferred to the maker for the purpose of defrauding the creditors of the payee could not be enforced in the hands of the payee against the maker. In the course of the opinion Chief-Justice Beasley indulged in the following refreshing observations: "It was urged that the statute for the prevention of frauds and perjuries does not invalidate transactions the end of which is to prevent or make difficult the collection of just claims, except so far as concerns creditors, and that, *inter partes*, such transactions, if containing no other infirmity, will be effectuated at law. It is certainly true, the statute referred to does not, *proprio vigore*, annul beyond the extent thus defined, the conveyances and contracts at which it is levelled. Nothing more than this was necessary to effect its purpose, which was the relief and protection of creditors against this class of frauds. But it is also clear, that it has no tendency to legalize any act which was not legal at the time of its en-

[1] Walton v. Tusten, 49 Miss. 577; Sweet v. Tinslar, 52 Barb. (N. Y.) 271; Canton v. Dorchester, 8 Cush. (Mass.) 525; Grider v. Graham, 4 Bibb (Ky.) 70; Baldwin v. Cawthorne, 19 Ves. 166; Ellington v. Currie, 5 Ired. (N. C.) Eq. 21; St. John v. Benedict, 6 Johns. Ch. (N. Y.) 111; Waterman on Specific Performance, ed. 1881, § 340; Chapin v. Pease, 10 Conn. 72; Tyler v. Tyler, 25 Ill. App. 343. See § 429.

[2] Gebhard v. Sattler, 40 Iowa 152.

[3] Pusey v. Gardner, 21 W. Va. 474; Troll v. Carter, 15 W. Va. 567; Zane v. Fink, 18 W. Va. 755. See Cutler v. Tuttle, 19 N. J. Eq. 549.

[4] Church v. Muir, 33 N. J. Law 319.

actment. . . . . A contract, the purpose of which is to protect a debtor against the just claims of creditors, is an immoral act. Such an affair is inimical to social policy. It is in direct opposition both to the letter and spirit of the statute for the prevention of frauds. . . . . In their essence and in their effects, such contracts are as immoral and pernicious as many of those which the law has declared to be utterly void. In these respects how are they to be distinguished from contracts to indemnify persons against the consequences of their illegal acts; against liability for the publication of a libel; from promises by uninterested parties to furnish money for the prosecution of law-suits; from agreements in contravention of the bankrupt or insolvent acts, or in general restraint of trade; or from that host of other conventions, which have been so often judicially condemned, not on account of any enormous immorality, but on the score of their inconsistency with public interest and good government? I can see no reason why contracts to defraud creditors should stand on a different footing from the rest of those embraced in the class to which they evidently belong. They are hostile to fair dealing and commercial honesty, and, on this account, should be subjected to the ban of outlawry."[1]

§ 397. **Massachusetts cases.** — In Massachusetts a long series of cases has established the rule that a transfer either of real or personal property, made with a view to defraud the creditors of the grantor, although the grantee has participated in this intention, is good between the parties, and void only in favor of creditors; or to speak accurately, is voidable by creditors at their election. If no creditors intervene the conveyance stands; if creditors elect to affirm

[1] Compare Nellis v. Clark, 20 Wend. (N. Y.) 37, and dissenting opinion of Chief-Justice Nelson; Briggs v. Merrill, 58 Barb. (N. Y.) 389; Ager v. Duncan, 50 Cal. 325; Goudy v. Gebhart, 1 Ohio St. 262; Hamilton v. Scull, 25 Mo. 165; Andruss v. Doolittle, 11 Conn. 283; Merrick v. Butler, 2 Lans. (N. Y.) 103.

the transfer and receive the consideration, it is thereby ratified and confirmed. Payment of the grantor's debts to the full value of the property purges the fraud.[1] This doctrine extends to executory contracts.[2] In Freeland v. Freeland[3] the court say: "A conveyance made in fraud of creditors is valid as between the parties, and can be avoided only by creditors, or by the assignee in insolvency representing them; and, if he affirms it, it stands good."[4]

§ 398. General rule and policy.—These covinous conveyances are binding upon heirs,[5] legatees,[6] and, as is elsewhere shown,[7] in certain cases upon personal representatives[8] and assignees.[9] The fraudulent conveyance is treated as so far valid that creditors of the vendee may seize upon the property and may even cancel a reconveyance of it to the grantor.[10]

Though a reconveyance cannot be enforced, the fraudulent vendee is said, in some of the cases, to be under a high moral and equitable obligation to restore the property.[11] The law is not so unjust as to deny to men the right, while

[1] Drinkwater v. Drinkwater, 4 Mass. 354; Oriental Bank v. Haskins, 3 Met. (Mass.) 332; Crowninshield v. Kittridge, 7 Met. (Mass.) 520.

[2] Knapp v. Lee, 3 Pick. (Mass.) 452; Dyer v. Homer, 22 Pick. (Mass.) 253. See The Lion, 1 Sprague 40; Harvey v. Varney, 98 Mass. 120.

[3] 102 Mass. 477.

[4] Citing Butler v. Hildreth, 5 Met. (Mass.) 49; Snow v. Lang, 2 Allen (Mass.) 18; Harvey v. Varney, 98 Mass. 118. See § 107.

[5] Moseley v. Moseley, 15 N. Y. 334. See § 121.

[6] Guidry v. Grivot, 2 Martin N. S. (La.) 13; S. C. 14 Am. Dec. 193. See § 121, n.

[7] See §§ 112, 113.

[8] Blake v. Blake, 53 Miss. 193; Merry v. Fremon, 44 Mo. 522; Davis v. Swanson, 54 Ala. 277; Loomis v. Tifft, 16 Barb. (N. Y.) 545.

[9] See § 115; also Chap. XXI.

[10] Chapin v. Pease, 10 Conn. 69. See § 387. In Allison v. Hagan, 12 Nev. 46, the court said: "Nor will the courts, as between the parties to a fraudulent conveyance, or between a fraudulent grantee and his creditors, permit either the fraudulent grantor or grantee to be heard in avoidance of the fraudulent act."

[11] In Fargo v. Ladd, 6 Wis. 106, it was held that where the grantee of property fraudulently conveyed had voluntarily reconveyed to the grantor, in apparent execution of his trust, he could not thereafter make a valid claim to the property, or its proceeds, on the ground of the original fraudulent conveyance. See Second National Bank v. Brady, 96 Ind. 505.

it is in their power to do so, to recognize and fulfill their obligations of honor and good faith. And until the creditors of the vendee acquire actual liens upon the property they have no legal or equitable claims in respect to it, higher than, or superior to, those of the grantor.[1] It has been contended that the transfer only made visible an ownership which already existed though secretly.[2]

The boundaries of these rules as to the conclusiveness of voluntary or covinous conveyances between the parties have, however, been broken over in some instances. And the rule itself has been questioned upon the theory that both parties are seldom equally to blame in a transaction tinctured with fraud in each, and if they are the doctrine seems to encourage a double fraud on the one side to punish the single fraud on the other.[3]

§ 399. **When aid will be extended to grantors.**—This rule, it has been said, did not in the nature of things apply where the grantor was not *in pari delicto* with the grantee, as where a creditor availed himself of his power over a debtor and induced him by misrepresentation to make a fraudulent conveyance to him.[4] Thus in Roman v.

[1] Davis v. Graves, 29 Barb. (N. Y.) 485; Stanton v. Shaw, 3 Baxter (Tenn.) 12. Mr. Roberts says (Roberts' Fraudulent Conveyances, p.641), that "voluntary conveyances were always binding upon the party, and all claiming voluntarily under him; and the statutes of Elizabeth against fraudulent conveyances have expressly guarded against a construction in derogation of this rule." Thus in the statute 13 Elizabeth, c. 5, it was provided that the fraudulent gifts and grants therein denounced should be void *only* against those persons whose actions, debts, and accounts are hindered and delayed; and in 27 Eliz. it was with similar caution provided that the voluntary conveyances in the contemplation of that act should be void *only* as against those who should thereafter purchase upon *good, i. e.* valuable, consideration.

[2] See Keel v. Larkin, 83 Ala. 146, and cases cited; Lillis v. Gallagher, 39 N. J. Eq. 94.

[3] Gowan v. Gowan, 30 Mo. 476. Compare Nichols v. McCarthy, 53 Conn. 299.

[4] Austin v. Winston, 1 Hen. & M. (Va.) 33; Holliway v. Holliway, 77 Mo. 396. In Mississippi it is held that a defendant cannot resist payment of the purchase price of goods sold and delivered to him, on the ground that the sale was in fraud of the creditors of the seller. Gary v. Jacobson, 55 Miss. 204. But see, *contra*, Church v. Muir, 33 N. J. Law 318; Nellis v. Clark, 4

Mali[1] the doctrine is asserted that there may be different degrees of guilt as between the parties to a fraudulent or illegal transaction, and if one party act under circumstances of oppression, imposition, undue influence, or at a great disadvantage, with the other party concerned, so that it appears his guilt is subordinate to that of the defendant, the court in such case will extend relief. Parker, J., said in James v. Bird :[2] "There is no case in equity where any relief has been given to a fraudulent grantor of property, the conveyance being made to protect it against his creditors, except that of Austin v. Winston,[3] decided by a divided court, and perhaps, *under the circumstances*, properly decided." The authority of the case, however, has been in some measure acknowledged in several States.[4] The court in Fletcher v. Fletcher[5] concede that it would assist the grantor in cases where circumstances were shown which warranted its interposition on recognized and settled grounds of equity jurisprudence, "such as fraud in procuring the deed, imposition by the grantee in violation of some fiduciary relation, delusion, or the like, on the part of the grantor, at the time of executing the deed." In Pinckston v. Brown[6] it appeared that at the time the deed was executed the plaintiff was old, infirm, weak of mind, and much diseased and distressed in body. The deed was made with a view to hinder and delay the collection of a debt. The party benefited was the plaintiff's oldest son, in whose ability and integrity she had the greatest confidence. The transfer had undoubtedly been consummated by means of

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Hill (N. Y.) 424; Walton v. Bonham, 24 Ala. 513. See Moseley v. Moseley, 15 N. Y. 334.

[1] 42 Md. 513.

[2] 8 Leigh (Va.) 510.

[3] 1 Hen. & M. (Va.) 33.

[4] See Bellamy v. Bellamy, 6 Fla. 104; Freeman v. Sedwick, 6 Gill (Md.) 41; Cushwa v. Cushwa, 5 Md. 53; Quirk v. Thomas, 6 Mich. 111. But compare Clay v. Williams, 2 Munf. (Va.) 121; Starke v. Littlepage, 4 Rand. (Va.) 371; Jones v. Comer, 5 Leigh (Va.) 357; Griffin v. Macaulay, 7 Gratt. (Va.) 564.

[5] 2 MacAr. (D. C.) 39, 40.

[6] 3 Jones' Eq. (N. C.) 496. See Nichols v. McCarthy, 53 Conn. 299.

the undue influence and deceit practiced upon and exercised over the aged and confiding mother by the son. The court held that the mother and son were *in delicto*, but not *in pari delicto*, and at the suit of the mother set the transaction aside.[1] In a case which came before the Supreme Court of New York,[2] A. sued B. for slander. B. to protect himself conveyed property to C., who agreed to reconvey. B. defeated the slander suit. It was held that C. must reconvey. Johnson, J., said: "Gilman had at the time no other creditors, and his sole design was to get his property out of the way of any judgments which might possibly be recovered in those actions, and not to hinder, delay, or defraud any other person whatever. It turned out that the several plaintiffs in those actions had no 'lawful' claim against Gilman. They were not creditors, and, as to them, the conveyance was valid, as it was, also, between the grantor and grantee. It was not designed to defraud the plaintiff of his claim, as the referee expressly finds. As this conveyance was not made with intent to hinder, delay, or defraud any existing creditor, or any person having a lawful claim, but only a person making an unlawful and unfounded claim, which the defendant Gilman disputed and denied, and ultimately defeated, it may present a grave question, whether it falls at all within the condemnation of the statute. . . . . The sole object of the statute here, in declaring conveyances void, is to protect, and prevent the defeat of, *lawful* debts, claims, or demands, and not those which are unlawful, or trumped up, and which have no foundation in law or justice, and the verity of which is never established by any judgment, or by the assent of the person against whom they are made. As against claims and demands of the latter class, the statute does not forbid conveyances or assignments, nor declare them void." It may well be

[1] See Osborne v. Williams, 18 Ves. 382; Story's Equity Jur. § 300.

[2] Baker v. Gilman, 52 Barb. (N. Y.) 36.

seriously questioned, however, whether this contention can be uniformly upheld. The courts would be justified in refusing to inquire whether the grantor's apprehensions as to the recovery of a judgment against him were well or ill founded, and might well incline to leave the parties in the position in which it found them.[1]

§ 400. **Cases and illustrations.**—In Boyd v. De La Montagnie[2] it appeared that a husband had secured a gratuitous transfer of property from his wife by means of false representations on his part, that she was liable for a debt, when in fact no such liability existed. Though the transaction was consummated in the belief that the effect of the transfer would be to hinder and delay the creditors, or in some way to save the property, it was held to be no answer that the wife consented to the act with a view to defraud creditors. Chief-Justice Church said: "The parties do not stand on equal terms, and the husband cannot avail himself of the plea of *particeps criminis* on the part of the wife." A court of equity will interpose its jurisdiction to set aside instruments between persons occupying relations in which one party may naturally exercise an influence over the conduct of another. A husband is held to occupy such a relation to his wife, and these equitable principles apply to them in respect to gratuitous transfers by the wife to the husband.[3] So in Freelove v. Cole[4] it was decided that as there are degrees of crime and of wrong, the courts can and will give relief in many cases as against the more guilty. "To exclude relief in such cases," said Smith, J., "the parties must not only be *in delicto* but *in pari delicto*." Applying this doctrine it was held that where the plaintiff was infirm of mind and incompetent to manage

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[1] Compare Tantum v. Miller, 11 N. J. Eq. 551; Harris v. Harris, 23 Gratt. (Va.) 737, 764, and see *contra*, Fletcher v. Fletcher, 2 MacAr. (D. C.) 38.

[2] 73 N. Y. 498.

[3] See Barnes v. Brown, 32 Mich. 146.

[4] 41 Barb. (N. Y.) 326; affirmed, 41 N. Y. 619, without an opinion.

and conduct his business affairs with ordinary prudence and discretion, and the defendant was his son-in-law, confidential friend, and legal adviser, and had procured a conveyance to himself of the property in order to place it beyond the reach of the plaintiff's creditors, relief might still be accorded the plaintiff.[1] Ford v. Harrington,[2] an important and leading case in the New York Court of Appeals, in which judges of the eminence of Denio, Johnson, Comstock, Selden, and Brown participated, seems clearly to establish the same general principle. It was there expressly held that where an attorney procured from a client a conveyance of a valuable interest in land for a manifestly inadequate consideration, the conveyance being advised by the attorney with a view to defeat a creditor of the grantor, though the agreement was illegal, yet the rule prohibiting the attorney from obtaining any unconscionable advantage in dealing with his client must prevail, and the attorney could be compelled to reconvey the land.[3] And where the parties to a conveyance are brothers, the grantor being crippled and diseased in body, weak in mind, and easily influenced, and under the control of the grantee, who was a person vigorous in both body and mind, the conveyance was set aside at the suit of the grantor, it appearing that no consideration was paid, that a reconveyance was promised,

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[1] In O'Conner v. Ward, 60 Miss. 1025–1035 (decided in April, 1883), the Supreme Court of Mississippi said: "We do not agree with the proposition announced by Mr. Bump in his work on Fraudulent Conveyances, that where a person has sufficient capacity to contract, and makes a conveyance with intent to hinder, delay, or defraud his creditors, a court of equity will not inquire into the degrees of guilt between the grantor and the grantee. The rule is not universal, and, as stated, is not supported by the authorities." Cited and quoted are Osborne v. Williams, 18 Ves. 382; Pinckston v. Brown, 3 Jones' Eq. (N. C.) 494; Smith v. Bromley, 2 Doug. 696; Browning v. Morris, Cowp. 790; Boyd v. De La Montagnie, 73 N. Y. 498; W. v. B., 32 Beav. 574; Ford v. Harrington, 16 N. Y. 285.

[2] 16 N. Y. 285. See Freelove v. Cole, 41 Barb. (N. Y.) 318; Gibson v. Jeyes, 6 Ves. 266; Smith v. Kay, 7 H. L. Cas. 771.

[3] See Boyd v. De La Montagnie, 4 T. & C. (N. Y.) 153.

and that the transfer was induced by operating upon the grantor's fears that he was in danger of losing the property by reason of a breach of promise suit which had no foundation in fact.[1]

§ 401. **The cases just considered exceptional.**—The practitioner, however, must be careful to remember that the cases just considered are exceptions to a well-defined and almost universal rule. While it is possible to deduce from them a general principle that degrees of guilt will be recognized in such transactions, and that grantors may, in certain cases, reclaim the property fraudulently alienated where the transaction was superinduced by the unfair action of a vendee who occupied some relation of confidence which enabled him to unduly influence the vendor, yet a very clear case

[1] Holliway v. Holliway, 77 Mo. 396. See Cadwallader v. West, 48 Mo. 483; Bradshaw v. Yates, 67 Mo. 221; Ford v. Hennessy, 70 Mo. 581; Ranken v. Patton, 65 Mo. 378; Garvin v. Williams, 44 Mo. 465. In Fisher v. Bishop, 108 N. Y. 25, 29, it appeared that plaintiff, who was much advanced in years, became involved as indorser for his son, who failed and absconded. Just prior to leaving the son gave the father scant security for the liability. W., a justice of the peace, was employed to draw the papers. Thereafter W., by threats to the effect that the conveyance was fraudulent and could be set aside, persuaded plaintiff to give defendants a mortgage to secure a debt of the son which the father was under no obligation to assume. Ruger, Ch. J., said: "The extent to which the plaintiff confided in the defendant Wattles is clearly shown by the fact that he had frequently employed him in business transactions, and that the conveyances which he then threatened to annul and overthrow were drawn by him, and accepted under his advice and co-operation. It was a gross breach of good faith for a person thus trusted, and who had by conducting the business, vouched for its validity and lawfulness, to turn around for the purpose of gaining a personal advantage, and assert that he had been engaged in an illegal transaction, which he could at his own option annul and destroy. The case shows that by these means the defendants have obtained security for a large amount, from an old man who was under no legal or moral obligation to give it, and without any consideration to support it except the nominal one of a dollar, and that this was extorted at a time when he was laboring under much distress and anxiety of mind, on account of the trouble that encompassed him. The parties in this case did not meet on equal terms, and the defendants took an unfair advantage of the position in which they had been placed, and of the confidence reposed in them by the plaintiff, to procure from him a valuable security to which they had no legal right."

with well-defined reasons for excepting it from the general rule must be presented. Debtors contemplating fraudulent alienations should draw little encouragement from these exceptional cases, for, as a general rule, after passing through the troubled waters of insolvency they will find themselves stripped of the power to reach or recover the secreted property in the hands of their fraudulent grantees. The ancient rule, *in pari delicto melior est conditio possidentis*, is not to be easily uprooted, and must not be considered as overthrown or abrogated by these cases. The great effort has been, in at least a portion if not all of the cases just considered, to show that the parties were *not in pari delicto* because of the reliance and confidence placed in the grantee, especially when he assumed to advise or act in a professional capacity, or occupied a position where he could exercise undue influence over the vendor. In Renfrew v. McDonald,[1] the fraudulent grantor, seeking to set aside a conveyance made to hinder creditors, was summarily dismissed on the opening oral statement of his counsel. The plaintiff alleged great intimacy with and confidence in the defendant, and charged that it was through his influence and procurement that the fraudulent conveyance had been made, and that defendant had knowingly advised plaintiff that he had no defense to certain notes, the collection of which plaintiff sought to hinder and delay by the conveyance in question, when in fact a defense did exist. The court said: "Nothing is alleged by way of excuse for the attempted fraud, except what might be with more or less truth alleged in every case. The recipient of property with intent to defraud creditors, possesses the intimacy and confidence of the fraudulent debtor, and advises the attempted fraud and consents to be made the instrument thereof. To allow the grantor in such a case to set aside the grant and be restored to all he has parted with for the illegal purpose,

[1] 11 Hun (N. Y.) 255.

would be to afford great encouragement to future attempts of that character." In Fredericks v. Davis[1] the doctrine is asserted that the grantor in an alleged fraudulent conveyance, made with full knowledge of the facts, is estopped by his own warranty of title from testifying that the conveyance is fraudulent.[2] This doctrine is supported by the case of Phillips v. Wooster,[3] wherein the court say: "The position which the plaintiff occupies in relation to the transaction complained of as fraudulent, excludes him from alleging the fraud, or claiming any benefit against it. The conveyance against which he now seeks to derive advantage from the property, was made by himself, with a full knowledge of all the facts as they existed at the time, as we are bound to presume since he has shown nothing to the contrary.[4] So that if the money paid was the debtor's, as he now insists it was, and the conveyance to the wife therefore fraudulent as against creditors, it was not fraudulent as against him, for he was not only consenting to the act, but himself performed it."

§ 402. **Grantee enforcing fraudulent deed.**—The rule being established that the courts will not interfere to set aside a fraudulent executed contract as between the parties, it has been contended that the same principle would preclude the grantee both from enforcing his apparent right to the possession of the land under the deed, and from collecting the rents or damages.[5] A consideration of the reason and policy of the rule, however, led the courts to hold otherwise. It is considered a mistake to suppose that the parties being *in pari delicto*, the court would refuse the grantee all remedy. The deed as between the parties is perfectly good. The grantor, by a stern but necessary policy of the law, is

[1] 3 Mont. 251.

[2] Compare Dodge v. Freedman's Sav. & Trust Co., 93 U. S. 383; Pitts v. Wilder, 1 N. Y. 525; Gates v. Mowry, 15 Gray (Mass.) 564; Harvey v. Varney, 98 Mass. 118.

[3] 36 N. Y. 414.

[4] Citing Grant v. Morse, 22 N.Y. 323.

[5] Peterson v. Brown, 17 Nev. 176.

excluded from presenting the proof which would show the fraud. He is in this respect the actor; his fraud silences and estops him from averring against his deed.[1] The rule operates only in cases where the refusal of the court to aid either party *frustrates* the object of the transaction, and destroys one of the temptations to enter into contracts violating the policy of the law.[2] To permit the grantor, when sued by the grantee, to plead the mutual fraud of the parties, in order to enable him to avoid the effect of the deed by being permitted to remain in possession of the property without the payment of rent or damages, would virtually be permitting him to reap the reward of his own iniquity since he was the real actor in the fraud, and would tend to encourage others to violate the law, with the hope of profiting by committing frauds upon their creditors. It would nullify the rule.[3] There is a distinction between an executed and an executory fraudulent contract. As to the latter the court, where the parties are equally participants in the fraud, *in pari delicto*, will leave them in the predicament where they place themselves, refusing any relief or interference. And where the contract is executed, as by a deed transferring the title, the court acts upon the same principle, declining either to cancel the deed or restore the title. But the effect is very different; in one case a specific performance will be refused; in the other the fraudulent grantee remains owner of the estate as against the grantor, and all the world except the defrauded creditors.[4]

§ 403. **Fraud upon a debtor as distinguished from fraud upon creditors.**—Fraud practiced by a third party upon a debtor is manifestly a different thing from fraud upon creditors, and it may well be doubted whether a creditor can

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[1] Broughton v. Broughton, 4 Rich. Law (S. C.) 497. See Bonesteel v. Sullivan, 104 Pa. St. 9.

[2] Peterson v. Brown, 17 Nev. 177; Starke v. Littlepage, 4 Rand. (Va.) 372. See Cushwa v. Cushwa, 5 Md. 52; Murphy v. Hubert, 16 Pa. St. 57.

[3] Murphy v. Hubert, 16 Pa. St. 57; Peterson v. Brown, 17 Nev. 177–179.

[4] Walton v. Tusten, 49 Miss. 576.

seize property the title to which has passed to a third party, or attack such a conveyance where the creditor proceeds upon the ground that the purchaser committed a fraud upon the seller which entitled the latter to avoid the sale. In Garretson v. Kane[1] the court used these words: "A creditor cannot redress all the wrongs done to his debtor. He cannot claim damages for a trespass or for a deceit. A fraud like that offered to be proved in this case would entitle the seller to relief in a court of equity upon proper terms, and possibly a creditor may have relief there; but he cannot step in and claim that such a sale was absolutely void at law. If he can interfere at all his rights will be the same as those of his debtor. . . . . A creditor who seeks to avoid a sale as fraudulent against him, does not represent his debtor, but exercises rights paramount to his. There is in truth no similarity between [the] two kinds of fraud. In the one case it is, either in fact or in law, the fraud of the debtor himself, while in the other the debtor is the victim, and guilty of no wrong. A case may occur combining both descriptions of fraud."[2] It will be at once apparent that this element of the law enters largely into the cases in which the debtor or grantor has a standing to attack or avoid his own transfer.

§ 404. **Declaring deed a mortgage.**—As is elsewhere stated, an absolute conveyance may be shown to be a mortgage.[3] The theory of the decisions is that dealings between the borrower and the lender of money, or debtor and creditor, conducted by requiring an absolute deed for security, and a renunciation of all legal right of redemption, are so significant of oppression, and so calculated to invite to or

[1] 27 N. J. Law 211.

[2] See Graham v. Railroad Co., 102 U. S. 148. Compare Eaton v. Perry, 29 Mo. 96; Prosser v. Edmonds, 1 Y. & C. 481; French v. Shotwell, 5 Johns. Ch. (N. Y.) 555; Crocker v. Bellangee, 6 Wis. 645; Hovey v. Holcomb, 11 Ill. 660; McAlpine v. Sweetser, 76 Ind. 78.

[3] Campbell v. Dearborn, 109 Mass. 130; Carr v. Carr, 52 N. Y. 251. See § 238.

result in wrong and injustice on the part of the stronger toward the weaker party in the transaction, as in themselves to constitute a *quasi* fraud against which equity ought to relieve, as it does against the strict letter of an express condition of forfeiture. The grounds of relief being purely equitable, it may and should be refused if the equitable considerations upon which it rests are wanting. Therefore an absolute deed made by a debtor to one creditor, with the intention to defraud other creditors, will not be adjudged an equitable mortgage at the solicitation of the debtor. Fraud against creditors cannot be set up, it is true, by any one not standing upon the rights of a defrauded creditor to defeat any legal claim or interest which the fraudulent debtor may seek to enforce. But such a party is in no condition to ask a court of equity to interfere actively in his behalf, to secure to him the fruits of his fraudulent devices. One who comes for relief into a court whose proceedings are intended to reach the conscience of the parties, must first have that standard applied to his own conduct in the transactions out of which his grievance arises. If that condemns him he cannot insist upon applying it to the other party.[1]

§ 404*a*. **Redeeming mortgaged property.**—The courts will not seek to enlarge the scope or legal effect of a transaction that is tainted with a design to defraud creditors. Hence where property is pledged or mortgaged by a debtor the pledgor or mortgagor will be permitted to redeem it though the design to defraud creditors may have been present in his mind when the pledge was made or the loan procured. Such a transaction does not in itself purport to vest an absolute title in the pledgee or mortgagee, and the courts will not strive to enlarge or vary its operation merely to inflict punishment upon a fraudulent debtor by

[1] Hassam v. Barrett, 115 Mass. 256, 258.

cutting off the right to redeem.[1] Another illustration may be cited. In Gowan v. Gowan[2] it was expressly decided that where a debtor deposits personal property with a bailee to protect it from creditors, the bailee cannot defeat the debtor's action to recover the property by setting up the fraud.

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[1] See Smith v. Quartz Mining Co., 14 Cal. 242; Taylor v. Weld, 5 Mass. 109, 116; Jones v. Rahilly, 16 Minn. 320.

[2] 30 Mo. 472.

CHAPTER XXVII.

JURISDICTIONAL QUESTIONS—CONCLUSION.

§ 405. Jurisdiction beyond State boundaries.
406. Outside county of defendant's residence.
§ 407. Appeal to United States Supreme Court—Uniting claims.
407*a*. Certificate of division.

§ 405. **Jurisdiction beyond State boundaries.**—A few miscellaneous observations will bring this branch of the discussion to a close.

Creditors may be reminded that the courts of one State cannot entertain jurisdiction of an action to recover lands lying in another State where the proceeding is *in rem*,[1] for actions for the recovery of real property, or for the determination of an interest therein, are local and must be brought in the State and county where the premises are situated.[2] But where the court has jurisdiction of the proper parties, it may, by its judgment or decree, as we have seen, compel them to do equity in relation to lands located without its jurisdiction. The court in such case acts *in personam*,[3] and may compel a specific performance of a contract for the sale of land beyond the borders of the State,[4] or a conveyance of lands outside the State jurisdic-

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[1] Gardner v. Ogden, 22 N. Y. 333.

[2] Sedgwick & Wait on Trial of Title to Land, 2d ed., § 465, and cases cited. See American Union Tel. Co. v. Middleton, 80 N. Y. 408; Blake v. Freeman, 13 Me. 130. Foreign statutes have no force *ex proprio vigore*, but the title of a foreign assignee may be recognized by comity if this can be done without injustice to home citizens. Matter of Waite, 99 N. Y. 433.

[3] Gardner v. Ogden, 22 N. Y. 333; Arglasse v. Muschamp, 1 Vern. 75; Penn v. Lord Baltimore, 1 Ves. Sr. 444; Paschal v. Acklin, 27 Texas 173; Dale v. Roosevelt, 5 Johns Ch. (N. Y.) 174; Newton v. Bronson, 13 N. Y. 587; Sutphen v. Fowler, 9 Paige's Ch. (N. Y.) 280; Great Falls Mfg. Co. v. Worster, 23 N. H. 462.

[4] Newton v. Bronson, 13 N. Y. 587.

tion when the title has been fraudulently obtained by a defendant;[1] and a debtor may be compelled to convey lands in another State for the benefit of creditors, so as to vest in the grantee the legal title.[2] So the court has power to decree the cancellation of a void mortgage which is an apparent lien and cloud upon property beyond the jurisdiction of the court. "This power," says Johnson, J., "has been frequently exercised to compel parties to perform their contracts specifically, and execute conveyances of lands in other States, and also to set aside fraudulent conveyances of lands in other States."[3] "Where the necessary parties are before a court of equity," said Swayne, J., "it is immaterial that the *res* of the controversy, whether it be real or personal property, is beyond the territorial jurisdiction of the tribunal. It has the power to compel the defendant to do all things necessary, according to the *lex loci rei sitæ*, which he could do voluntarily, to give full effect to the decree against him."[4] Without regard to the situation of the subject-matter, such courts consider the equities between the parties, and enforce obedience to their decrees by process *in personam*.[5]

§ 406. **Outside county of defendant's residence.**—In a case which arose in Georgia,[6] it appeared that the constitution and laws of that State required that suits must be brought in the county in which the defendant resided, and it was held that it was good ground of demurrer to a bill in equity to set aside a fraudulent conveyance of land that it was not filed in the county of the defendant's residence. The defect was held not to be cured by the fact that the bill was filed in the county where the land was situated, or because a lessee of the defendant in possession of the property was

[1] Gardner v. Ogden, 22 N. Y. 327.
[2] Bailey v. Ryder, 10 N. Y. 363.
[3] Williams v. Ayrault, 31 Barb. (N. Y.) 364, 368.
[4] Phelps v. McDonald, 99 U. S. 308.
[5] Miller v. Sherry, 2 Wall. 249; Mitchell v. Bunch, 2 Paige (N. Y.) 606.
[6] Taylor v. Cloud, 40 Ga. 288.

a party to the bill, when no substantial relief was sought against such tenant.[1] This is exceptional practice, for, at least so far as realty is concerned, the action to set aside a conveyance would be local, and local actions should be brought in the county where the land lies.[2]

§ 407. **Appeal to United States Supreme Court—Uniting claims.**—When judgment-creditors join in a suit to set aside a fraudulent conveyance by their debtor, and the amounts found due to the creditors respectively are less than the jurisdictional limit of the United States Supreme Court, the several claims cannot be united to give jurisdiction on appeal.[3] In Seaver v. Bigelows,[4] Nelson, J., said: "The judgment-creditors who have joined in this bill have separate and distinct interests depending upon separate and distinct judgments. In no event could the sum in dispute of either party exceed the amount of their judgment. . . . . The bill being dismissed each fails in obtaining payment of his demands. If it had been sustained, and a decree rendered in their favor, it would only have been for the amount of the judgment of each." In Schwed v. Smith[5] the same court held that if the decree was several as to creditors it was difficult to see why it was not also several as to their adversaries, the theory being that although the proceeding was in form but one suit, its legal effect was the same as though separate suits had been instituted on each of the separate causes of action.[6]

§ 407*a*. **Certificate of division.**—Whether a sale and delivery of a debtor's stock of goods, by way of preference of a *bona fide* creditor, is fraudulent against other creditors, in-

[1] See Smith v. Bryan, 34 Ga. 53.

[2] Sedgwick & Wait on Trial of Title to Land, 2d ed., § 465.

[3] Schwed v. Smith, 106 U. S. 188; Gibson v. Shufeldt, 122 U. S. 27. See Fourth National Bank v. Stout, 113 U. S. 684; Hawley v. Fairbanks, 108 U. S. 548; *Ex parte* Phœnix Ins. Co., 117 U. S. 369; Tupper v. Wise, 110 U. S. 398; Stewart v. Dunham, 115 U. S. 61.

[4] 5 Wall. 208.

[5] 106 U. S. 188.

[6] See *Ex parte* Baltimore & O. R.R. Co., 106 U. S. 5.

volves a question of fact, depending upon all the circumstances and cannot be referred to the United States Supreme Court by certificate of division of opinion.[1]

This closes the discussion concerning fraudulent conveyances and creditors' bills. We have traced the famous statute of Elizabeth from its enactment to the present time, and have seen how important the place it fills has become in our jurisprudence. The volume of litigation engendered by covinous alienations is scarcely creditable to the integrity of our people. The ability of the courts to successfully grapple with fraudulent debtors without the coercive aid of imprisonment frequently becomes a matter of grave doubt. Hence it is that the existence of cases accomplishing results like those of Cutting v. Cutting,[2] and Broadway Bank v. Adams,[3] is to be so deeply deplored. That the law regulating the remedies of creditors against covinous conveyances and for the conversion of equitable assets is developing in the right direction, and becoming more effectual against the debtor class, must be conceded. It is still, however, in an unsatisfactory condition. The many forms in which a debtor's assets can be secreted or spirited away, and the endless varieties of fraudulent devices, render the solution of the problem a matter of extreme difficulty. Time and experience alone can work out a satisfactory conclusion. The development must of necessity be in the courts; we doubt the ability of the legislative power to further materially progress this branch of our law.

[1] Jewell v. Knight, 123 U. S. 426. [2] See § 40. [3] See § 367.

VOID AND VOIDABLE ACTS.

CHAPTER I.

VOID AND VOIDABLE ACTS DISCUSSED.

§ 408. Void and voidable acts.
409. Importance of the subject.
410. Scope of the inquiry.
411. The distinction generally stated —Illustrations.
412. Misleading definitions in the early cases.
413. Doctrine of degrees of void acts.
414. Other inaccuracies.
415. Nullities or void acts defined.
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420. Void and voidable acts distinguished.
421. Absence of jurisdiction as distinguished from excess of jurisdiction.
422. Jurisdiction and the exercise of jurisdiction.
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425. Result of the cases—Principles applicable to a nullity.
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§ 427. Effect of avoidance.
428. Four classes of defective or ineffectual acts.
429. Void and illegal acts discussed.
430. Policy of the law.
431. Guilty knowledge.
432. Illegal acts.
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434. Void in part, void *in toto*.
435. Void acts which are not illegal.
436. } Acts void by statute of frauds.
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441. Void and voidable marriages.
442. Irregularities and nullities distinguished.
443. Justification under irregular or erroneous process.
444. Words "erroneous" and "irregular" discussed.
445. Void used in the sense of voidable.
446. Terms "become void" and "determined" distinguished.
446*a*. Void or voidable negotiable instruments.
446*b*. Defective public securities.

§ 408. **Void and voidable acts.**—Covinous alienations belong to one of the common classes of voidable acts or transactions. The use of the word "void" in the sense of

"voidable" in the statute of Elizabeth[1] has also aided in creating some of the confusion to be found in the authorities concerning the legal signification of, and distinction between, these two words. The inquiry upon which we are about to enter has been suggested in part by these considerations. Though the discussion opens a wide field, we shall necessarily treat it in a limited and very general way, making only incidental reference to fraudulent conveyances. A glance at the authorities has convinced the writer that exhaustive treatment upon so general a theme is not, in the nature of things, possible. We would willingly suppress what has been here attempted, had not other counsels protested that it should be preserved.

A clear comprehension of the legal characteristics of void and voidable acts, and an accurate statement of the distinctions which exist in modern jurisprudence between such acts, is manifestly of the highest importance. These classes of acts are usually treated and considered as mere incidents in connection with the discussion of rights flowing from valid acts. No controlling objection, however, can be suggested to the independent classification and discussion of such acts. A task of this kind successfully accomplished would tend to render the body of our law more compact and accessible, lighten the labors of the student, and be especially valuable as bringing, side by side, cases decided from common motives or considerations, arising out of dissimilar transactions. The great confusion which has been introduced into this branch of the law is due in part to the meagre, imperfect, and misleading definitions of "nullities" or "void acts" contained in the earlier reports; in part to the carelessness of judges and law writers, and largely to the improper use by legislative bodies of the word "void," in statutory enactments, where "voidable" was intended.

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[1] See §§ 317, 445.

Blunders in determining whether an act is void or voidable, or in deciding which of these two great classes embrace it, are often fraught with disastrous consequences to the rights of the parties interested. At the threshold of the inquiry there is presented a distinction in jurisdiction, and a distinction as to the form of action or procedure, or the character of the plea or answer to be interposed, in a legal controversy involving the transaction. If the act is an absolute nullity it may, as a general rule, be totally ignored and disregarded, and no loss of rights will result from laches or inaction or in any way. On the contrary, should the act be voidable merely, but not absolutely void, speedy action to affirm and ratify it, or disaffirm and avoid it, by plea, suit, notice, or other act, may become necessary to protect and preserve the rights of the parties.

§ 409. **Importance of the subject.**—These two words "void" and "voidable," or rather the legal results flowing from their constant use and application in the law, play an important part in our jurisprudence, and are constantly coming up for interpretation and exposition in every phase of litigation, and are the subject of consideration in practically all the varying transactions of life. A careful study of the cases, and their number is large, where the boundaries between nullities, or acts which are absolutely without legal effect, and voidable acts, or transactions which are or may become valid for some or all purposes, have been overlooked or disregarded, abundantly justifies special treatment of the subject, and renders necessary a discussion of the different methods of redress applicable to each class of acts.[1] This discussion, and the classification of the cases

[1] *Void and voidable confounded.*—"Probably no words are more inaccurately used in the books than *void* and *voidable*." Chief-Justice Ryan in Bromley v. Goodrich, 40 Wis. 139. "In regard to the consequences to third persons the distinction is highly important, because nothing can be founded upon a deed which is *absolutely void*; whereas from those which are only voidable fair titles may flow. These terms have not always been used

showing the application of the principles by virtue of which void and voidable acts are defined and distinguished, will of necessity incidentally involve the rules and tests governing acts, contracts, or transactions which possess all the necessary elements of vitality, are legal and binding, being neither void nor voidable, and the consummation of which does not contravene any settled principle of law. Rights resting upon or flowing from acts or contracts of this character will not be considered, except in so far as may be requisite to point out the fatal error or imperfection in the void or voidable act under discussion, by comparison or analogy with an act which concededly would be valid and effectual for every purpose.

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with nice discrimination; indeed in some books there is a great want of precision in the use of them." Chief-Justice Parker in Somes v. Brewer, 2 Pick. (Mass.) 191. See Crocker v. Bellangee, 6 Wis. 668. "The use of the word 'void' in a loose and uncertain sense is no novelty, either in legislation or the language of jurists." Terrill v. Auchauer, 14 O. S. 85. See Van Shaack v. Robbins, 36 Iowa 204; Green v. Kemp, 13 Mass. 518; Brown v. Brown, 50 N. H. 552; Kearney v. Vaughan, 50 Mo. 284. "The word 'void' has certainly been construed as 'voidable' in some instances." Denman, Ch. J., in Pearse v. Morrice, 2 Ad. & El. 94. "It is by no means easy to lay down any one rule, whereby to distinguish between an irregularity and that which makes a proceeding a nullity." Coleridge, J., in Chambers v. Coleman, 9 Dowl. 594. "Deductions founded on the broadest meaning of this word (void) would lead to greater errors than are found in the most erroneous cases, while those founded on its narrower and more usual meaning seldom err. When we say that any given class of contracts is *void*, let us be sure of the meaning of the word before we undertake to declare all the consequences that follow from its application. Observation of its use will give us its meaning." Again it is said in this same case: "Acts tainted with an infirmity may very well, and in very correct language, be called by some void, and by others voidable, because, regarded in different aspects, they are both. A contract may for a time be voidable as against one, and void as against the others, whom it is intended to affect; voidable as against the parties doing wrong, and void as against the persons wronged; or *vice versa*, voidable in favor of the persons wronged, and void in favor of the wrong-doer; void as not binding to fulfil and voidable after fulfilment; voidable in fact because void or not binding in right. And when the party wronged elects to avoid the act, it becomes binding on neither, or rescinded as to both. Voidable because one party is bound, and the other, or some other person is not." Pearsoll v. Chapin, 44 Pa. St. 13. "Many difficulties . . . . have arisen out of the use of the words 'void' and 'voidable,' and the uncertain extent of meaning attached to them." Dillon, C. J., in Allen v. Berryhill, 27 Iowa 538.

§ 410. Scope of the inquiry.—The inquiry will therefore be limited chiefly to immature and imperfect acts, to what are sometimes called legal abortions; to acts which are void because settled principles of law have interfered to prevent their formation or consummation; to cases where "a contract fails to be made when it seems to have been, or, having been made, can be rescinded by one side or the other, and treated as if it had never been."[1] The discussion will embrace not only a general classification of these acts, but in addition a consideration of the principles and rules governing their avoidance or affirmance.

§ 411. The distinction generally stated—Illustrations.—It may be observed in a very general way that acts are considered void largely for reasons prompted by considerations of public policy, for example, transactions which are *mala in se*, or in some cases *mala prohibita*; that acts are voidable chiefly where the rights of individuals who are regarded as under the guardianship of the law would be injuriously affected by their enforcement.[2] These tests are not exclusive. The acts of infants, lunatics, and idiots are familiar examples of the latter class. They are peculiarly under the protection of the law. The infant is presumed to lack sufficient discretion to act or contract; reason is wanting in degree. In the case of a lunatic, however, especially after inquisition, or of an idiot,[3] reason is wanting altogether. Hence it is said that a lunatic needs more protection than a minor.[4] The policy of the law rendering

[1] Holmes' Common Law, p. 308.

[2] Judge Holmes in his admirable lectures on the Common Law, says (p. 308): "When a contract fails to be made, although the usual forms have been gone through with, the ground of failure is commonly said to be mistake, misrepresentation, or fraud. But I shall try to show that these are merely dramatic circumstances, and that the true ground is the absence of one or more of the primary elements which have been shown, or are seen at once, to be necessary to the existence of a contract."

[3] See Owing's Case, 1 Bland's Ch. (Md.) 386; Stewart v. Lispenard, 26 Wend. (N. Y.) 314; Crosswell v. People, 13 Mich. 436; *Ex parte* Bromfield, 1 Hov. Supp. 184.

[4] Dexter v. Hall, 15 Wall. 9. But see Breckenridge v. Ormsby, 1 J. J.

ineffectual acts of corporations which are *ultra vires* may be considered as founded upon both of these considerations. The general public are interested in seeing that only the corporate powers actually conferred upon the corporation by its franchise are exercised; creditors and stockholders are interested in the application and use of the property of the corporation solely toward the legitimate purpose of its existence.[1]

Marsh (Ky.) 236; S. C. 19 Am. Dec. 71. In Edwards v. Davenport, 20 Fed. Rep. 761, the court said: "The rule as to the responsibility of a lunatic or person *non compos mentis*, upon his contracts, is the same in equity as in law."

[1] See § 426.

Doctrine of ultra vires.—In Kent v. Quicksilver Min. Co., 78 N. Y. 185, Folger, J., said: "In the application of the doctrine of *ultra vires* it is to be borne in mind that it has two phases: one where the public is concerned, one where the question is between the corporate body and the stockholders in it, or between it and its stockholders and third parties dealing with it and through it with them. When the public is concerned to restrain a corporation within the limit of the power given to it by its charter, an assent by the stockholders to the use of unauthorized power by the corporate body will be of no avail. . . . . A corporation may do acts which affect the public to its harm, inasmuch as they are *per se* illegal or are *malum prohibitum*. Then no assent of stockholders can validate them. It may do acts not thus illegal, though there is want of power to do them, which affect only the interest of the stockholders. They may be made good by the assent of the stockholders, so that strangers to the stockholders dealing in good faith with the corporation will be protected in a reliance upon those acts." See, further, Taylor v. Chichester & M. Ry. Co., L. R. 2 Exch. 390; Whitney Arms Co. v. Barlow, 63 N. Y. 63. In Bissell v. Mich. Southern & N. I. R.R. Cos., 22 N. Y. 269, Chief-Justice Comstock observed: "The books are full of cases upon the powers of corporations and the effect of dealing in a manner and for objects not intended in their charters; but with the slight exception named, there is an entire absence, not only of adjudged cases, but of even judicial opinion or dicta, for the proposition that mere want of authority renders a contract illegal. Such a proposition seems to me absurd. The words *ultra vires* and illegality represent totally different and distinct ideas. It is true that a contract may have both those defects, but it may also have one without the other. For example, a bank has no authority to engage, and usually does not engage, in benevolent enterprises. A subscription, made by authority of the board of directors and under the corporate seal, for the building of a church or college or an almshouse, would be clearly *ultra vires*, but it would not be illegal. If every corporator should expressly assent to such an application of the funds, it would still be *ultra vires*, but no wrong would be committed and no public interest violated." In Matter of McGraw, 111 N. Y. 106, Peckham, J., said: "The theory upon which the plea of *ultra vires* is examined is that it will not, as a general rule, prevail whether

§ 412. **Misleading definitions in the early cases.**—The consideration of this general subject is not free from difficulties and embarrassments. The definitions of void and voidable acts are, as has been remarked, misleading and imperfect. It is said in the earlier text-books and abridgments that "void things are good to some purpose."[1] Whatever understanding may have prevailed in earlier times as to the true meaning in law of the word void, it is manifest that as applied in our modern jurisprudence this definition is incorrect, for, as we shall presently see, void acts are *not* "good to some purpose."[2] No deed can be pronounced in a legal sense utterly void which is valid as to some persons, but may be avoided at the election of others.[3]

§ 413. **Doctrine of degrees of void acts.**—Again, it is laid down in the ancient books that a thing may be void in several degrees. First, void so as if never done *to all purposes* so as all persons may take advantage thereof; second, void to some purposes only; third, so void by operation of law that he that will have the benefit of it may make it good.[4] It can scarcely be said with strict accuracy that different degrees of void acts are recognized in modern jurisprudence. "Void things are no things"; a nullity cannot be subdivided; nothing can be founded upon what is absolutely void.[5] Clearly the third degree above instanced does not define a nullity or void act; such an act, as will presently appear, is incapable of ratification or of being made good. No waiver or acceptance can give it vitality. Ratification would be itself as ineffectual and invalid as the void act.[6] A void act, as we shall show, ac-

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interposed for or against a corporation, when it will not advance justice, but will accomplish a legal wrong."

[1] Finch's Law, 8vo, 62; 22 Viner's Abridgment, 12.

[2] See Dewing v. Perdicaries, 96 U. S. 196. See § 425.

[3] Spencer, C. J., in Anderson v. Roberts, 18 Johns. (N. Y.) 528.

[4] Keite v. Clopton, Carter 19; 22 Viner's Abridgment, 13.

[5] Bromley v. Goodrich, 40 Wis. 140.

[6] United States v. Grossmayer, 9 Wall. 75; Marsh v. Fulton County, 10

complishes and effects no results; establishes and secures no rights; is ineffectual for all purposes; and may be absolutely disregarded by every one.[1]

§ 414. **Other inaccuracies.**—Again, it is said that a thing is void which was done against law at the very time of the doing it, and no person is bound by such act; but a thing is only voidable which is done by a person who ought not to have done it, but who, nevertheless, cannot avoid it himself after it is done, although it may by some act in law be made void by his heir, etc.[2] As defining a void act, this statement is manifestly meagre and imperfect, while as embodying the elements of a voidable act, it is positively wrong. The remark that a person who does a voidable thing "cannot avoid it himself" is not true.[3] The case of infancy, not to instance other examples, is clearly

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Wall. 684. See McCracken v. City of San Francisco, 16 Cal. 624; Dewing v. Perdicaries, 96 U. S. 196. In Veeder v. Mudgett, 95 N. Y. 310, Finch, J., observed that "An act absolutely and wholly void, because, under the law, incapable of being performed, cannot be made valid by estoppel. This is true where under the law there is an entire lack of power to do the act which is brought in question. The distinction is well illustrated in Scovill v. Thayer, 105 U. S. 143. Under the law of Kansas no company like that then before the court could increase its capital to more than double an amount originally authorized. The capital was sought to be increased in excess of that amount. As against creditors it was claimed to be a valid increase by the operation of an estoppel, but the court ruled otherwise, and justly; for the very foundation of an estoppel, the misleading of creditors to their injury, was wanting. The latter knew and were bound to know that no power existed to so increase the capital, and therefore that it was not increased; and hence they were not, and could not be misled. But where, as in the present case, the abstract power did exist, and there was a way in which the increase could lawfully be made, and the creditors could, without fault, believe that the increase had been lawfully effected and the necessary steps had been taken, there the doctrine of estoppel may apply, and the increased stock be deemed valid as against the creditors who have acted upon the faith of such increase."

[1] See §§ 419, 489.

[2] 2 Lilly's Abr. 807; 10 Bacon's Abr. 374.

[3] "The term *void* will be used to express that which is in its very creation wholly without effect, an absolute nullity, and *voidable* where the instrument or act in its creation has an effect to transfer something, *but which may be defeated by the person making it*, by showing an inherent vice or defect in the transaction." Chief-Justice Parker in Somes v. Brewer, 2 Pick. (Mass.) 191.

in point against the accuracy of this definition. It is universally conceded, as we shall presently see, that an infant, upon attaining his majority, may disaffirm and avoid a voidable act or contract done or entered into by him in his infancy, and that the great majority of his acts are voidable.[1] True this definition is quoted without criticism, and in the leading case of Anderson v. Roberts[2] is even apparently regarded as embodying the true distinction between void and voidable acts by so learned a jurist as Chief-Justice Spencer, but the whole tenor of the opinion in that case clearly shows that the learned judge could not have regarded the test as universally correct, and that his apparently unqualified approbation of its accuracy was an oversight. These definitions being inaccurate and misleading, an effort will be made, in the progress of this limited discussion, to define a nullity or void act, and to formulate the rules by which it may be detected and distinguished from a voidable or valid act.[3]

§ 415. **Nullities or void acts defined.**—It is very difficult to give a concise and yet sufficiently comprehensive definition of a nullity. Its character will be best understood after reference to the decided instances of it and to the incidents which pertain to it. Perhaps, however, it may be defined as a proceeding that is taken without any foundation for it, or that is essentially defective, or that is expressly declared to be a nullity by a statute.[4] The word nullity, as applied to a suit or action, has been defined to be "such a defect as renders the proceedings in which it occurs totally null and void, of no avail or effect whatever, and incapable of being made so."[5] Though this definition relates to a judicial proceeding it may be regarded as ap-

[1] See §§ 450–459.

[2] 18 Johns. (N. Y.) 528.

[3] See § 425.

[4] Salter v. Hilgen, 40 Wis. 365, citing Macnamara on Nullities, p. 4.

[5] Macnamara on Nullities, p. 4. See Salter v. Hilgen, 40 Wis. 365; Allis v. Billings, 6 Met. (Mass.) 417; Somes v. Brewer, 2 Pick. (Mass.) 191; Inskeep v. Lecony, 1 N. J. L. 111; Van Shaack v. Robbins, 36 Iowa 201; Anderson v. Roberts, 18 Johns. (N. Y.) 527.

plicable to acts and transactions generally. A void act is "so nugatory and ineffectual that nothing can cure it." Hence a void writ is incurably defective; but if it be merely voidable, the defect may be remedied by acts of the defendant which estop him from contesting its validity.[1] So a judgment is void if given by one who has no colorable right to act.[2] In Cable v. Cooper[3] the court say that "it is a universal rule in regard to all things that are void that they are as if they had never been." In Anderson v. Roberts[4] Chief-Justice Spencer said: "A thing is void which is done against law at the very time of doing it, and where no person is bound by the act." This is borrowed from the definition in Lilly's Abridgment already cited.[5]

§ 416. **Illustrations of void acts.**—Contracts to do an illegal act or omit a legal public duty, contracts in a form forbidden by law, attempted official acts of persons having no recognized title *de facto* or *de jure* to the office, contracts to do an impossible thing, or that leave uncertain the thing that is to be done; such acts or contracts are, in legal contemplation, absolutely void because they have no legal sanction and establish no legitimate bond or relation between the parties, and even a stranger may raise the objection.[6] In Oliver v. Houdlet[7] the court say: "An act

[1] Coleman v. Mansfield, 1 Miles (Pa.) 59.

[2] Hervey v. Edmunds, 68 N. C. 245.

[3] 15 Johns. (N. Y.) 155.

[4] 18 Johns. (N. Y.) 527. See Stevens v. Hyde, 32 Barb. (N. Y.) 176.

[5] See § 414.

[6] See Pearsoll v. Chapin, 44 Pa. St. 9; Humphreston's Case, 2 Leon. 218; Lane v. Cowper, F. Moore 103. As to charitable bequests void for uncertainty, see Bridges v. Pleasants, 4 Ired. Eq. (N. C.) 26; s. c. 44 Am. Dec. 94, and note beginning at page 98. As to when the bequests are void for uncertainty in amount, see Hartshorne v. Nicholson, 26 Beav. 58; Flint v. Warren, 15 Sim. 626; Ewen v. Bannerman, 2 Dow & C. 74; and for uncertainty of object, see Trippe v. Frazier, 4 Har. & J. (Md.) 446; Dashiell v. Attorney-General, 6 Har. & J. (Md.) 1; Goddard v. Pomeroy, 36 Barb. (N. Y.) 546; Fontain v. Ravenel, 17 How. 369; Owens v. Missionary Society, 14 N. Y. 380; White v. Fisk, 22 Conn. 31; Beekman v. Bonsor, 23 N. Y. 298; Holland v. Alcock, 108 N. Y. 312; Prichard v. Thompson, 95 N. Y. 76; Power v. Cassidy, 79 N. Y. 602; Cottman v. Grace, 112 N. Y. 299.

[7] 13 Mass. 239; s. c. 7 Am. Dec. 134.

merely void may be treated as a nullity by either party and even by a stranger." The word void is defined as being applicable to an act "of no legal force or effect whatsoever; null and incapable of confirmation or ratification."[1] "If the contract is void the title does not pass."[2] So it has been observed that if a judgment or decree be null, no action on the part of the plaintiff, no inaction upon the part of the defendant,[3] no resulting equity in the hands of third persons, no power residing in any legislative or other department of the government,[4] can invest it with any of the elements of power or of vitality. Hence, where there is a total absence of power in a corporation to issue bonds under any circumstances, and not a mere failure to comply with prescribed requirements and conditions, bonds so issued are absolutely void, and the payment of installments of interest thereon, or the exercise of acts of ownership over property received as the proceeds of the bonds, will not make a case for the application of any doctrine of estoppel or ratification; the payments and acts of ownership are equally unauthorized and void. A void act cannot be ratified.[5] A void act never is and never can be binding either on the party with whom it originates or on others.[6]

§ 417. **Retrospective legislation affecting remedies.**—Right here a clear-cut distinction plainly shadowed forth in the authorities may be considered. A suit is instituted and process served in a court which is without jurisdiction at the time of such issuance, but upon which jurisdiction is subsequently conferred by statute. Remedial statutes,

[1] Van Shaack v. Robbins, 36 Iowa 203; Webster's Dict.; Dewing v. Perdicaries, 96 U. S. 195.

[2] Holmes' Common Law, p. 332.

[3] See Kramer v. Holster, 55 Miss. 243.

[4] See Pryor v. Downey, 50 Cal. 388; s. c. 19 Am. R. 656; Maxwell v. Goetschius, 40 N. J. Law 383; s. c. 29 Am. R. 242; Freeman on Void Judicial Sales, § 56; Griffin v. Cunningham, 20 Gratt. (Va.) 109; Lane v. Nelson, 79 Pa. St. 407.

[5] See Parkersburg v. Brown, 106 U. S. 487; Loan Association v. Topeka, 20 Wall. 667; Veeder v. Mudgett, 95 N. Y. 310; Scovill v. Thayer, 105 U. S. 143.

[6] Henry v. Root, 33 N. Y. 537.

especially acts of Congress,[1] may have a retroactive effect, and confer jurisdiction over a pending action.[2] Even though the court lacked jurisdiction at the outset, the proceeding is not regarded as void in the sense of being wholly incapable of confirmation or ratification. The issuance of the writ is not void, nor the filing of the declaration, nor the service of the process; they possess at least sufficient vitality to present the question of jurisdiction itself, and to support a valid finding in favor of the defendant that the court is without jurisdiction. When the case comes up for trial the inquiry will be limited to the question of the present authority to try the controversy.[3] The doctrine of the retrospective effect of remedial legislation is illustrated in the case of repealing acts which operate to take away jurisdiction from pending suits;[4] and acts of Congress transferring suits to State and Federal courts respectively when a new State is admitted are valid.[5]

§ 418. **Adjudications to avoid nullities.**—The word void, as we shall presently see, can scarcely be applied with propriety to acts which outwardly appear to be sound, and which, while unimpeached, can enforce respect, and confer and establish rights, and the infirmity of which cannot be made manifest. A void act "is a *caput mortuum*, and nothing can give it vitality."[6] Hence a writ which is a

[1] There are no constitutional restrictions upon Congress in the matter of retrospective legislation. See Larkin v. Saffarans, 15 Fed. Rep. 149; Satterlee v. Matthewson, 2 Pet. 380; Sinking Fund Cases, 99 U. S. 700.

[2] See Sampeyreac v. United States, 7 Pet. 222; S. C. Hempst. 118; Townsend v. Townsend, Peck (Tenn.) 1, 17; Fisher v. Dabbs, 6 Yerg. (Tenn.) 118. "Where the enactment deals with procedure only, unless the contrary is expressed, the enactment applies to all actions, whether commenced before or after the passing of the act." Broom's Legal Maxims, 35. See Wright v. Hale, 6 H. & N. 227; Kimbray v. Draper, L. R. 3 Q. B. 160; Larkin v. Saffarans, 15 Fed. Rep. 150.

[3] Larkin v. Saffarans, 15 Fed. Rep. 152; Sampeyreac v. United States, 7 Pet. 222; S. C. Hempst. 118.

[4] Larkin v. Saffarans, 15 Fed. Rep. 153.

[5] See Railroad Co. v. Grant, 98 U. S. 398; South Carolina v. Gaillard, 101 U. S. 433; *Ex parte* McCardle, 7 Wall. 514; Benner v. Porter, 9 How. 235; McNulty v. Batty, 10 How. 72.

[6] Dewing v. Perdicaries, 96 U. S. 196.

nullity cannot be a ground of proceedings for contempt for disobeying its mandate.[1] As will be shown, a defect in a legal proceeding that "does not take away the foundation or authority for the proceeding, or apply to its whole operation," is an irregularity as distinguished from a nullity.[2] Again a transaction, it is said, is void when it is a mere nullity and incapable of confirmation; whereas a voidable transaction is one which may be either avoided or confirmed by matter arising *ex post facto*.[3] The court remark, in Pearsoll v. Chapin,[4] that "even nullities may be only *voidable* in the sense that a regular adjudication is necessary to declare them void." This is clearly not a correct statement. While it may be true that a suit in equity will lie to cancel an instrument which is void, but apparently valid, or order it to be delivered up, this is done upon the principle *quia timet* as it is called, that is, through fear that such instrument may be vexatiously or injuriously used when the evidence upon which its nullity is predicated is lost or diminished, or through fear that it may throw a cloud or suspicion over the plaintiff's title and interest.[5] That a formal adjudication is necessary, however, to avoid a nullity, is certainly incorrect. Even the relief just instanced will not be extended where the invalidity or illegality of the instrument appears on its face and admits of no doubt.[6]

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[1] State v. Civil District Court, 13 Reporter 780.

[2] Chambers v. Coleman, 9 Dowl. 588–595.

[3] 1 Steph. Com. 474, 475. "The line of distinction has not been accurately drawn as to all the cases where the process is merely erroneous, and those where it is an absolute nullity, and perhaps each case must depend in some measure on its own circumstances." Day v. Sharp, 4 Whart. (Pa.) 342.

[4] 44 Pa. St. 13.

[5] Cooper v. Joel, 27 Beav. 313; W. v. B., 32 Beav. 574; Pettit v. Shepherd, 5 Paige (N. Y.) 493; Fish v. French, 15 Gray (Mass.) 520; Onions v. Cohen, 2 Hem. & M. 354. See § 512.

[6] See Stuart v. Palmer, 74 N. Y. 183; Guest v. City of Brooklyn, 69 N. Y. 506; Nichols v. Voorhis, 18 Hun (N. Y.) 33.

Clouds on Title.—In Townsend v. The Mayor, 77 N. Y. 545, Earl, J., delivering the opinion of the New York Court of Appeals, said: "The action is to set aside and cancel the tax, upon the ground that it is illegal and a cloud upon plaintiff's title to his lands. It is

Thus when a writ is void it can derive no vitality from the defendant's inaction. He cannot be compelled to move to vacate it, but on the contrary may disregard it altogether, and may at any time successfully resist any claims based upon it. As, however, the process may be employed to cloud his title or subject him to various annoyances, the more prudent course is to move to have it quashed. That courts will vacate void process, and also process based upon

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claimed to be illegal solely upon the ground that the law in pursuance of which it was imposed is unconstitutional and therefore void. . . . . It is a general rule that the owner of real estate must wait until his title is assailed, or his possession is disturbed, or his rights are actually interfered with, before he can invoke the protection of the courts. The law generally concerns itself only with actual wrongs, and not with such as are merely potential. But there are some exceptions to this rule. Courts will, under certain circumstances, entertain actions to remove a cloud upon title to land to prevent future harm. It is not sufficient that there is a formal title or lien creating the cloud. Where the cloud is claimed to be created by a lien, the lien must be apparently valid, and must exist under such circumstances that it may in the future embarrass or injure the owner or endanger his title. But it has been decided many times in this State that where the lien is invalid upon its face, or where the invalidity will necessarily appear in any proceeding taken to enforce title under it, then the jurisdiction of a court of equity cannot be invoked to set it aside. Then the owner must wait until his title is actually assailed under the lien, and his defense will always be at hand. [Scott v. Onderdonk, 14 N. Y. 9; Heywood v. City of Buffalo, 14 N. Y. 534; Ward v. Dewey, 16 N. Y. 519; Hatch v. City of Buffalo, 38 N. Y. 276; Newell v. Wheeler, 48 N. Y. 486; Marsh v. City of Brooklyn, 59 N. Y. 280.] . . . . No valid tax can be imposed under an unconstitutional law, and such a tax could not constitute such a cloud upon title as to call for the interference of a court of equity. [Stuart v. Palmer, 74 N. Y. 183.]" Mr. Justice Field, in Pixley v. Huggins, 15 Cal. 127, 133, lays down the following test to determine whether a cloud exists upon a title: "Would the owner of the property, in an action of ejectment, brought by the adverse party, founded upon the deed, be required to offer evidence to defeat a recovery? If such proof would be necessary the cloud would exist; if the proof would be unnecessary no shade would be cast by the presence of the deed. If the action would fall of its own weight, without proof in rebuttal, no occasion could arise for the equitable interposition of the court; as in the case of a deed void upon its face, or which was the result of proceedings void upon their face, requiring no extrinsic evidence to disclose their illegality." See also "Clouds upon Title," Cent. L. J. 261. In no case can that be called a cloud which upon its face is void. New York & N. H. R.R. Co. v. Schuyler, 17 N. Y. 592, 599. But when such claim appears to be valid upon the face of the record and the defect can only be made to appear by extrinsic evidence, particularly if that evidence

void judgments, and thereby relieve the defendant from annoyance, there can be no doubt.[1]

§ 419. **No degrees of nullities.**—The apparently irresistible inclination to subdivide and classify nullities is further illustrated in the case of Means v. Robinson,[2] in which absolute nullities are declared to be of two kinds: "Those resulting from stipulations derogating from the force of laws made for the preservation of public order or good morals, and those established for the interest of individuals."[3] The former it is said are not susceptible of ratification; but if by subsequent dispositions of law, or by succession of time, such stipulations cease to be illegal, they may from that time be ratified. It may be here observed that the use of the word absolute in this connection is practically meaningless; it is a mere epithet. A nullity being some act or transaction which is totally void, and accomplishes no result, and is incapable of being made effectual or available by ratification or laches in any manner, an *absolute* nullity will not be of any greater or different effect. Nullities differing in degree, as has been said, cannot in the nature of things exist.[4] The statement that an absolute nullity may be ratified by "succession of time," or by laches, cannot certainly be accepted; it is subversive of every definition of a void act. That a nullity may be ratified after the condition which rendered it void is removed, by legislation or otherwise, may well be seriously questioned. It would be giving an entirely new and different effect to an act already performed with reference to the then existing

depends upon oral testimony to establish it, this presents a case for invoking the aid of a court of equity to remove it as a cloud upon the title. The case of fraud in procuring a deed to be executed which apparently conveys the title, or the case of the sale of land by a sheriff and the execution of a deed to the purchaser after redemption, or a sale upon a paid judgment, is a familiar illustration of a case of the latter kind. Ward v. Dewey, 16 N. Y. 522.

[1] See Mabry v. State, 9 Yerg. (Tenn.) 207.

[2] 7 Tex. 516.

[3] See Clay v. Clay's Heirs, 35 Texas 530.

[4] See § 413.

laws, and would be changing the rights and liabilities of the parties without their consent. Nor, as we shall see, can the doctrine be accepted that "the ratification of a void contract makes it a valid contract."[1]

§ 420. **Void and voidable acts distinguished.**—It is said in The State v. Richmond,[2] that there is "great looseness and no little confusion in the use of the terms void and voidable, growing, perhaps in some degree, out of the imperfection of our language."[3] The terms void and voidable as used in the books, have been said to stand for absolutely and relatively void. That is regarded as absolutely void which the law or the nature of things forbids to be enforced at all, and that is considered relatively void which the law condemns as a wrong to individuals and refuses to enforce as against them.[4] "A contract is void when it is a nullity obligatory on neither party and insusceptible of ratification; when either party is bound, or it may be confirmed, it is only voidable."[5] Another method of stating the distinction is given in the case of Fletcher v. Stone,[6] where it is said that acts which are *mala in se* are generally absolutely void, and that no right or claim can be derived from any such acts. But acts which are only *mala prohibita* are either void or voidable according to the nature and effects of the act prohibited. If it concerns the public good, it is generally to be considered void; but if it is prohibited for the purpose of securing the private rights of the parties interested, it is only voidable. This case embodies a general, but nevertheless a forcible and highly important exposition of the distinction between these acts. We may observe that the distinction sought to be drawn can scarcely be intelligently embodied in a general rule which will ena-

[1] See Clay v. Clay's Heirs, 35 Texas 509–530.

[2] 26 N. H. 237.

[3] See § 409, n.

[4] See Pearsoll v. Chapin, 44 Pa. St. 15.

[5] Breckenridge's Heirs v. Ormsby, 1 J. J. Mar. (Ky.) 240; S. C. 19 Am. Dec. 74.

[6] 3 Pick. (Mass.) 250–253.

ble the student to determine at a glance which class of these acts embrace a particular transaction. Human laws are too imperfect and business transactions too intricate to admit of such a scientifically accurate result. Resort must be had to instances and illustrations, many of which will be furnished to supplement the rule. The distinction between void and voidable judgments, which is discussed by the Supreme Court of Missouri in Gray v. Bowles,[1] may shed some light on the subject. Clark, J., said: "The distinction is between a lack of power or want of jurisdiction in the court and a wrongful or defective execution of the power. In the first instance all acts of a court not having jurisdiction or power are void, in the latter only voidable. A court may then act first without power or jurisdiction; second, having power or jurisdiction may exercise it wrongfully; or, thirdly, irregularly. In the first instance the act or judgment is void, and is as though it had not been done. The second is wrong and must be reversed upon error. The third is irregular and must be corrected on error."

§ 421. **Absence of jurisdiction as distinguished from excess of jurisdiction.**—In Bradley v. Fisher,[2] Mr. Justice Field, in delivering the opinion of the United States Supreme Court, said: "A distinction must be here observed between excess of jurisdiction and the clear absence of all jurisdiction over the subject-matter. Where there is clearly no jurisdiction over the subject-matter, any authority exercised is a usurped authority, and for the exercise of such authority, when the want of jurisdiction is known to the judge, no excuse is permissible. But where jurisdiction over the subject-matter is invested by law in the judge, or in the court which he holds, the manner and extent in which the jurisdiction shall be exercised are generally as much questions for his determination as any other ques-

[1] 74 Mo. 419; s. c. 13 Reporter 179. Bangs, 31 Fed. Rep. 642; *In re* Eaves,
[2] 13 Wall. 351, 352. See Cooke v. 30 Fed. Rep. 24.

tions involved in the case, although upon the correctness of his determination in these particulars the validity of his judgments may depend. Thus, if a probate court, invested only with authority over wills, and the settlement of estates of deceased persons, should proceed to try parties for public offenses, jurisdiction over the subject of offenses being entirely wanting in the court, and this being necessarily known to its judge, his commission would afford no protection to him in the exercise of the usurped authority. But if on the other hand a judge of a criminal court, invested with general criminal jurisdiction over offenses committed within a certain district, should hold a particular act to be a public offense, which is not by the law made an offense, and proceed to the arrest and trial of a party charged with such act, or should sentence a party convicted to a greater punishment than that authorized by the law upon its proper construction, no personal liability to civil action for such acts would attach to the judge, although those acts would be in excess of his jurisdiction, or of the jurisdiction of the court held by him, for these are particulars for his judicial consideration, whenever his general jurisdiction over the subject-matter is invoked. Indeed, some of the most difficult and embarrassing questions which a judicial officer is called upon to consider and determine relate to his jurisdiction, or that of the court held by him, or the manner in which the jurisdiction shall be exercised. And the same principle of exemption from liability which obtains for errors committed in the ordinary prosecution of a suit where there is jurisdiction of both subject and person, applies in cases of this kind, and for the same reasons."

§ 422. **Jurisdiction and the exercise of jurisdiction.**—A plain distinction must be observed between jurisdiction and the exercise of jurisdiction. A court may have the right and power to determine the *status* of a thing, and

yet may exercise its authority erroneously. After jurisdiction attaches in any given case, all that follows is exercise of jurisdiction. The right to inquire into the jurisdiction by another court in a collateral action is confined to the question of authority, and it does not extend to the question whether or not the court erred in the exercise of lawful authority to act. It is only a void judgment that may be attacked collaterally ;[1] where it is only voidable—where the proper court has decided improperly—the remedy is by resort to a higher court; and when the highest is reached the law gives no further remedy. By "proper court" is meant not merely a duly constituted tribunal, but one having authority over the subject-matter in the particular case in question. When the judgment is *coram judice*, neither error of fact nor of law in the exercise of jurisdiction will render it a nullity. It must stand until reversed by the appellate court.[2] "The cases are numerous," said Chief-Justice Marshall, "which decide that the judgments of a court of record having general jurisdiction of the subject, although erroneous, are binding until reversed."[3] In the case of Tyler v. Defrees,[4] the Supreme Court of the United States said: "These proceedings do not come before us on a writ of error to correct any irregularities or mere errors of law in the court which rendered the judgment, but they come before us collaterally as the founda-

[1] Hobart v. Frost, 5 Duer (N. Y.) 674; Butler v. Potter, 17 Johns. (N. Y.) 145; Easton v. Calendar, 11 Wend. (N. Y.) 90; Mygatt v. Washburn, 15 N. Y. 316; Bailey v. Buell, 59 Barb. (N. Y.) 158; People v. Supervisors, 11 N. Y. 563; Freeman v. Kenney, 15 Pick. (Mass.) 44; Lyman v. Fiske, 17 Pick. (Mass.) 231; Hannibal & St. Jo. R.R. Co. v. Shacklett, 30 Mo. 550; State v. Shacklett, 37 Mo. 280; Kempe's Lessee v. Kennedy, 5 Cranch 173; Knowles v. Muscatine, 20 Iowa 249; United States v. Arredondo, 6 Pet. 691; Grignon v. Astor, 2 How. 341; Griffin v. Mitchell, 2 Cow. (N. Y.) 549; Rhode Island v. Massachusetts, 12 Peters 657.

[2] Walker v. Sleight, 30 Iowa 325; Milne v. Van Buskirk, 9 Iowa 558; Martin v. Barron, 37 Mo. 301; Chase v. Christianson, 41 Cal. 253; Bond v. Pacheco, 30 Cal. 530; Alexander v. Nelson, 42 Ala. 462; Davis v. Helbig, 27 Md. 452; Covington v. Ingram, 64 N. C. 123; Dequindre v. Williams, 31 Ind. 444.

[3] *Ex parte* Watkins, 3 Pet. 207.

[4] 11 Wall. 331–344.

tion of the defendant's title. According to the well-settled doctrine in such cases no error can be regarded here, or could have been considered in the court below on the trial, that does not go to the extent of showing a want of jurisdiction in the court which rendered the judgment condemning the property."[1]

§ 423. **Distinctions in jurisdiction considered.**—In a case which arose in Alabama the court observed that the true distinction between void and voidable acts, orders, and judgments was, that the former could always be assailed in any proceeding, while the latter can only be attacked in a direct proceeding instituted for that purpose.[2] And in Dixon v. Watkins[3] it was said to be well settled that where a party was sued for an act done under color of process, if the process be void, the action should be trespass *vi et armis;* if voidable, trespass on the case. Where, however, the process is not totally defective and irregular, but merely erroneous and liable to be reversed on error, it is not void but voidable, and does not render the party issuing it a trespasser.[4] We may observe here, as further illustrating the distinction, that whenever a contract or obligation is void *ab initio* the general plea of *non est factum* is proper. Where it is merely voidable, a special plea is necessary setting forth the particular circumstances avoiding it.[5] This is upon the theory that the grantee or donee has acquired every appearance of ownership, and will not be deprived of the thing granted, unless the de-

[1] See Cooper v. Reynolds, 10 Wall. 308.

[2] Alexander v. Nelson, 42 Ala. 462. See Eaton v. Badger, 33 N. H. 228; Ponce v. Underwood, 55 Ga. 601; Anderson v. Roberts, 18 Johns. (N. Y.) 527; Stevens v. Hauser, 39 N. Y. 302; Buller's N. P. 172; Somes v. Brewer, 2 Pick. (Mass.) 196. "However summary, or however irregular, the judgment of a competent tribunal cannot be treated as a nullity." Buell v. Cross, 4 Ohio 329.

[3] 9 Ark. 139. See Bach v. Cook, 21 Ark. 571.

[4] Day v. Sharp, 4 Whart. (Pa.) 341.

[5] Anthony v. Wilson, 14 Pick. (Mass.) 303; Bottomley v. United States, 1 Story 145.

fect in his title is clearly shown and proved to the court.[1] So it is said that an infant cannot plead *non est factum* and give infancy in evidence; the incapacity must be set forth by special plea, and the same principle is applicable to a deed which has been obtained by duress.[2] In Somes v. Brewer,[3] a leading and highly important case to which we shall make frequent reference, Chief-Justice Parker, in the course of a lucid and exhaustive opinion, said: "I do not perceive that, in any instance, a deed of a party competent to contract has been deemed void or a nullity, on account of its being obtained from him by the fraud or imposition of the grantee. On the contrary it seems to me that it may be inferred from all of them that such a deed passes the estate, and is only voidable by showing, under a special plea, the circumstances which go to defeat it. These circumstances cannot be given in evidence on the plea of *non est factum*. And it seems to be usual in England to apply to the court of chancery for relief, which is given by setting aside the deed and ordering a reconveyance, which, however, may not be necessary where the deed is set aside; for the decree of the court makes it a nullity, although it had effect as a deed before."

The innovations in modern procedure, however, seem likely to impinge upon these clear-cut distinctions. Thus, in Van Deusen v. Sweet,[4] a lunatic's deed was held to be absolutely void, and a direct action to recover possession of the land, utterly ignoring the deed, was very correctly adjudged to be proper. No proceedings in equity to annul the void instrument were considered essential. But the court (*obiter*) went further and plainly intimated that it would have been competent for the plaintiff in this action in the nature of ejectment to have shown that the deed

[1] See Somes v. Brewer, 2 Pick. (Mass.) 197.

[2] Somes v. Brewer, 2 Pick. (Mass.) 197; Buller's N. P. 172.

[3] 2 Pick. (Mass.) 195.

[4] 51 N. Y. 384.

was voidable if such proof had been necessary to defeat the defendant's claim under this voidable deed and title. This seems like countenancing an unscientific and rough-shod method of procedure in the courts. A voidable title *is* a title; its voidable characteristics should be determined in an appropriate proceeding in which the facts impairing its force and the election to avoid it are disclosed by pleas, and the title divested of the semblance of regularity and legality by a proper adjudication.

§ 424. **Legislation or acts in aid of the rebellion.**—Let us glance for a moment at another line of illustration. Many recent well-considered cases are to be found especially in the United States Supreme Court, determining the effect of the legislation of the late Confederate government, and involving the legality of acts of individuals and legislative bodies in aid and support of the war against the government. The national importance and great prominence of the cases giving judicial construction to such acts render a brief notice of the results of the adjudications proper. Contracts and legislative acts in aid of the late rebellion are both illegal and void and cannot be enforced by the courts.[1] To recognize such acts as valid would be derogatory to the dignity and authority of the government of the United States, and would be setting too light an estimate upon so great an offense as rebellion.[2]

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[1] Thomas v. City of Richmond, 12 Wall. 357; Texas v. White, 7 Wall. 700; Hanauer v. Doane, 12 Wall. 342; Clements v. Yturria, 81 N. Y. 290. In Daniels v. Tearney, 102 U. S. 418, Mr. Justice Swayne said: "That the ordinance of secession was void, is a proposition we need not discuss. The affirmative has been settled by the arbitrament of arms and the repeated adjudications of this court. Texas v. White, 7 Wall. 700; Hickman v. Jones, 9 Wall. 197; Dewing v. Perdicaries, 96 U. S. 193."

[2] Thomas v. City of Richmond, 12 Wall. 357. "In the case of a debt paid, or property sold and paid for in Confederate money, it would be unreasonable to call upon the courts to rip up the transaction and compel the repayment of the money." Robinson v. International L. A. Soc., 42 N. Y. 66. Compare Thorington v. Smith, 8 Wall. 1; Planters' Bank v. Union Bank, 16 Wall. 500; State v. Bevers, 86 N.C. 594.

Confederate treasury notes when recognized by the parties as money, and dealt with in the ordinary course of business, disconnected with any purpose directly to be attained by putting them in circulation, constituted in themselves consideration sufficient to support a contract either executed or executory. The same principle must hold good in the case of its bonds, when treated as property and accepted under similar circumstances.[1] The test that the act or legislation must have been in aid of the rebellion is highly important, and must not be obscured, because laws enacted for the preservation of public order, and for the regulation of business transactions between man and man, and not to aid or promote the rebellion, though made by a *de facto* government not recognized by the United States, are so far upheld as to sustain the transactions which have taken place under them.[2]

§ 425. **Result of the cases—Principles applicable to a nullity.** —Without needlessly increasing the citation of cases or further quoting definitions in relation to the subject, and before classifying and discussing the cases in detail, the following rules are suggested as in some measure an aid in determining whether or not an act, contract, proceeding, or transaction is a nullity. First, a nullity is a totally void act or transaction, ineffectual for all purposes in its very creation, accomplishing no result, conferring or disturbing

[1] State v. Bevers, 86 N. C. 594.

[2] Thomas v. City of Richmond, 12 Wall. 357; Keith v. Clark, 97 U. S. 464. "Whilst thus holding that there was no validity in any legislation of the Confederate States which this court can recognize, it is proper to observe that the legislation of the States stands on very different grounds. The same general form of government, the same general laws for the administration of justice and the protection of private rights, which had existed in the States prior to the rebellion, remained during its continuance and afterward. As far as the acts of the States did not impair, or tend to impair, the supremacy of the national authority, or the just rights of the citizens under the Constitution, they are in general to be treated as valid and binding." Williams v. Bruffy, 96 U. S. 176, 192. See Keith v. Clark, 97 U. S. 465; Horn v. Lockhart, 17 Wall. 570; Sprott v. United States, 20 Wall. 459; Thorington v. Smith, 8 Wall. 10.

no rights, and of no effect or avail whatever.[1] Second, it is an act done against, or without any warrant of or foundation in law, and wholly incapable of ratification, adoption, or confirmation; the ratification is as ineffectual as the void act.[2] Third, it is an act which the nature of things forbids, and which is so wholly against law and without authority or effect that it may either be attacked in a collateral action or absolutely ignored, even by a stranger, in any transaction or proceeding. Life can never be infused into it.[3]

§ 426. **Voidable acts further defined.**—Voidable acts too are not readily defined, and will perhaps be more clearly comprehended and detected by illustrations and recorded instances. This class of acts occupies the intermediate ground between nullities and valid acts, and their characteristics have been already partially discussed. Blackstone says: "Idiots and persons of non-sane memory, infants and

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[1] Penal consequences may of course be incurred as where the act is not only rendered void by statute, but a penalty for its commission is imposed.

[2] Reese River Mining Co. v. Smith, L. R. 4 H. L. 64; Marsh v. Fulton Co., 10 Wall. 684; United States v. Grossmayer, 9 Wall. 75; Gray v. Hook, 4 N. Y. 449; Robinson v. Kalbfleisch, 5 N. Y. S. C. 212; Dewing v. Perdicaries, 96 U. S. 196. When, however, "two men make a contract in fraud of creditors neither of them can ratify it, for that would be to forgive their own sins. And so when the contract is in substance or in essential form *illegal*, neither party can ratify it, because the wrong done is against the State, and it only can forgive it. For this sort of wrong there can be no private ratification. A ratification that leaves the vice unpurged and unforgiven is itself null." Pearsoll v. Chapin, 44 Pa. St. 15.

[3] See Gilliland v. Sellers' Admr., 2 O. S. 223; Morse v. Presby, 25 N. H. 299; Eaton v. Badger, 33 N. H. 228; Wamsley v. Robinson, 28 La. An. 793; Ponce v. Underwood, 55 Ga. 601; Lyles v. Bolles, 8 S. C. 258; Doe v. Harter, 2 Ind. 252; Buell v. Cross, 4 Ohio 329; Dewing v. Perdicaries, 96 U. S. 196. In Voorhees v. Bank of the United States, 10 Peters 449–475, the United States Supreme Court said: "The line which separates error in judgment from the usurpation of power is very definite, and is precisely that which denotes the cases where a judgment or decree is reversible only by an appellate court, or may be declared a nullity collaterally, when it is offered in evidence in an action concerning the matter adjudicated, or purporting to have been so. In the one case it is a record importing absolute verity; in the other, mere waste paper." See Lessee of McCall v. Carpenter, 18 How. 305.

persons under duress, are not totally disabled either to convey or purchase, but *sub modo* only; for their conveyances and purchases are voidable but not actually void."[1] Generally speaking a voidable act or transaction is as effectual, establishes the same rights and produces the same results, as a valid act, unless and until it is disputed or impeached by plea,[2] act, or otherwise,[3] at the instance or election of some person, usually the party injured,[4] entitled so to do. Whenever the act takes effect for some purposes, and may be avoided as to persons who have an interest in its im-

[1] 2 Bl. Com. 291. "There can be no middle character assigned to judicial proceedings which are irreversible for error." Voorhees v. Bank of U. S., 10 Pet. 475.

[2] See Somes v. Brewer, 2 Pick. (Mass.) 197.

[3] *Voidable acts effectual until impeached.*—"The conveyance in either form is voidable, and not void, if fraudulent as to creditors; and until defeated by a creditor, the title of the grantor passes. The deed is good in all cases between the parties, however fraudulent the intent." Mansfield v. Dyer, 131 Mass. 201. See Freeland v. Freeland, 102 Mass. 477; Dunn v. Dunn, 82 Ind. 42; Harvey v. Varney, 98 Mass. 118; Hill v. Pine River Bank, 45 N. H. 309; Jones v. Bryant, 13 N. H. 57. "Such [fraudulent] conveyances are entirely good as between the parties and all other persons, except those who are injured, or intended to be injured, by them, to wit, creditors of the grantor." Walton v. Tusten, 49 Miss. 575. Citing Sherk v. Endress, 3 W. & S. (Pa.) 255; Dyer v. Homer, 22 Pick. (Mass.) 253; Randall v. Phillips, 3 Mason 378, *et seq.* See McMaster v. Campbell, 41 Mich. 516; Strange v. Graham, 56 Ala. 620. "The authorities . . . . do not sustain their position that if an administrator, who is about to sell real estate, procures a person to purchase it on his account, the sale is therefore void. The heirs may, within a reasonable time, elect to avoid it, and the purchaser is in such case regarded as a trustee; or they may allow it to stand, and in such case it is valid without any further act." Ives v. Ashley, 97 Mass. 204. "A purchase of trust property by a trustee at public sale has always been held valid at law, and is voidable only and not void in equity. It is voidable only at the election of the persons whose interests are affected by the purchase." Olcott v. Tioga R.R. Co., 27 N. Y. 567. Citing Jackson v. Van Dalfsen, 5 Johns. (N. Y.) 47; Jackson v. Walsh, 14 Johns. (N. Y.) 407; Wilson v. Troup, 2 Cow. (N. Y.) 196–238; Mackintosh v. Barber, 1 Bing. 50; Campbell v. Walker, 5 Ves. 678, and note a; Whichcote v. Lawrence, 3 Ves. 740, and note a.

[4] See Chandler v. Simmons, 97 Mass. 511. A trustee cannot avoid his purchase when the *cestui que trust* is satisfied. He can only file a bill calling upon the *cestui que trust* to confirm or avoid the sale. McClure v. Miller, Bailey's Ch. (S. C.) 107; Williams v. Marshall, 4 G. & J. (Md.) 376; Huff v. Earl, 3 Ind. 306.

peachment, it is voidable as distinguished from a nullity.[1] And if process is irregular, so that it is merely voidable and not void, it must be set aside or vacated before trespass can be brought.[2] In Fischer v. Langbein,[3] Ruger, Ch. J., said: "Process, however, that a court has general jurisdiction to award, but which is irregular by reason of the non-performance by the party procuring it, of some preliminary requisite, or the existence of some fact not disclosed in his application therefor, must be regularly vacated or annulled by an order of the court, before an action can be maintained for damages occasioned by its enforcement."[4] A voidable writ is one which, though improperly issued is valid until vacated by some proper proceeding. And where a contract turns upon circumstances of undue advantage, surprise, or imposition, it is valid until rescinded, and, if it is deliberately and upon full examination confirmed by the parties, it will become absolutely binding.[5] So it seems that a judgment of one of the late Confederate State courts is not absolutely void. If the defendant takes no proceedings to vacate it, and permits an execution to issue, a sale of the property thereunder is valid.[6]

And as a nullity is an act incapable of ratification, so, on

[1] Anderson v. Roberts, 18 Johns. (N. Y.) 515. See Gregory v. Whedon, 8 Neb. 377; Tremper v. Barton, 18 Ohio 418; Brown v. Webb, 20 Ohio 389.

[2] Day v. Bach, 87 N. Y. 60; Blanchard v. Goss, 2 N. H. 491; In the Matter, etc. v. Bradner, 87 N. Y. 171. Voidable acts are considered and deemed good until something is done to defeat or rescind them. Reese River Mining Co. v. Smith, L. R. 4 H. L. 64; Oakes v. Turquand, L. R. 2 H. L. 325. "A voidable act is one which has some force and effect, but which, in consequence of some inherent quality, may be legally annulled and avoided." 1 Bouvier's Inst. § 1322. Thus where a minor has made a conveyance of land during his nonage, he has on attaining his majority no interest in the lands subject to attachment, and his right to avoid the deed is a personal privilege which can only be exercised by the infant or his heirs. Kendall v. Lawrence, 22 Pick. (Mass.) 543.

[3] 103 N. Y. 90.

[4] Citing Day v. Bach, 87 N. Y. 56.

[5] Reese River Mining Co. v. Smith, L. R. 4 H. L. 64.

[6] Bush v. Glover, 47 Ala. 167. See § 424. A sale under a void writ passes no title to the land sold, though it is otherwise if the writ were merely voidable. Speer v. Sample, 4 Watts (Pa.) 368.

the other hand, defective acts which are capable of being legally ratified are usually voidable.[1] "When a contract is said to be voidable it is assumed that a contract has been made, but that it is subject to being unmade at the election of one party."[2]

§ 427. **Effect of avoidance.**—A voidable act, as the term implies, ordinarily requires action on the part of the person wronged to develop the inherent vice or defect which bars it out of the class of valid acts. In other words, in the absence of an effectual avoidance it will usually establish the rights incident to a valid act. The avoidance is generally the exclusive privilege of the injured party, and, as will presently be shown, may be effectuated by plea, or by bringing an action, filing a bill, and procuring a judgment of the court rescinding the act; by reconveyance,[3] re-entry, notice of rescission, etc.[4] It has been plausibly argued that in such cases the judgment does not annul the contract, but declares or decides that it *is* null; that an inherent vice or defect renders it not binding or obligatory but absolutely void, hence that the word void as a substitute for voidable as applied to such vicious contracts is not improper.[5] This argument is ingenious, but misleading. True, after the judgment of avoidance or act of disaffirmance, the voidable act practically becomes a nullity. Its valid elements and all semblance of regularity or legality are eliminated. But the avoidance which is a personal privilege of the in-

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[1] See Keane v. Boycott, 2 H. Bla. 512.

[2] Holmes' Common Law, p. 315.

[3] If a deed is not merely voidable but wholly void no reconveyance is necessary. "As the person named as grantor and grantee had no mind or intention that any estate should pass from the one to the other, and were merely cheated into the execution of deeds without a knowledge of their contents, no estate could pass and no reconveyance could properly be directed." Ogilvie v. Jeaffreson, 2 Giffard 381.

[4] See Whelpdale's Case, 5 Rep. 119. "The leading distinction is between judgments and decrees merely void, and such as are voidable only; the former are binding nowhere, the latter everywhere, until reversed by a superior authority." Hollingsworth v. Barbour, 4 Pet. 471.

[5] Pearsoll v. Chapin, 44 Pa. St. 9.

jured party, which he may never exercise, is one of the constituent parts of the new nullity, so that in its entirety it is made up of something more than an act void *ab initio*. In the case instanced in Pearsoll v. Chapin the judgment is necessary to avoid the legal effects of the voidable act, while in the case of a pure nullity no adjudication is essential; the void act may be ignored. The application of the word void to a voidable act, and the appalling confusion incident to the improper use of it so prevalent in the cases, cannot be justified on such a theory.

§ 428. **Four classes of defective or ineffectual acts.**—The distinction in the legal import of the words void and voidable is discussed with much clearness and force in State v. Richmond.[1] The court, in this case, as we have elsewhere remarked, attributed the confusion as to the meaning of the terms to the imperfection of our language, and this is possibly the most reasonable, as it certainly is the most charitable, solution of the difficulty. The opinion, after showing that there are at least four distinct kinds of defects which are included within these expressions, while the language furnishes only these two terms to express or define them all, proceeds to instance and classify the defects to which the terms void and voidable are applied, briefly as follows: First, acts which are wholly null and void, without force or effect as to all persons and for all purposes and incapable of being made effectual.[2] This is the broadest sense of the word void, and the acts which fall within this signification are not numerous. Second, acts which may be void as to some persons, and for some purposes, and as to them incapable of being made operative, which are yet valid as to other persons and effectual for other purposes, *e. g.*, a deed executed by an idiot, or by a person incapable of contracting, may be void as to the idiot and yet binding as to others. Third, acts may be void as to all persons and

[1] 26 N. H. 237.

[2] See § 425.

for all purposes, or as to some persons and for some purposes, though not binding as to others until they are confirmed; but though such acts are said to be void, they are not so in the broadest sense of that term, because they have a capacity of being confirmed, and after such confirmation they are binding. For this kind of defect our language affords no distinctive term. These acts are neither strictly void, that is, mere nullities, nor voidable, because they do not require to be avoided; but until confirmed they are without validity. They are usually spoken of as void, and, as usage is the only law of language, they are correctly so called. It is, therefore, always to be considered an open question, to be decided by the connection and otherwise, whether the term void is used in a given instance in one or the other of these, in some respects, dissimilar senses. Fourth, acts, contracts, and proceedings are properly called voidable which are valid and effectual until they are avoided by some act. *Prima facie* they are valid, but they are subject to defects of which some person has a right to take advantage, who may, by proper proceedings for that purpose, entirely defeat and destroy them. Voidable contracts are in general, perhaps always, like the last class referred to, capable of confirmation by the party who has the right to avoid them.

Holland says:[1] "A pretended act which is deficient in any one of the '*essentialia negotii*' is a 'nullity' 'void *ab initio*'; when, as a rule, the deficiency cannot be supplied by any subsequent change of circumstances, '*quod initio vitiosum est non potest tractu temporis convalescere.*'[2] In exceptional cases the deficiency can be waived or is cured by lapse of time. In certain other cases the act, though not *ipso facto* void, is 'voidable' at the option of a party concerned." This statement reveals the same trouble encountered in State v. Richmond.[3] The "exceptional

[1] "Elements of Jurisprudence," by Thomas Erskine Holland, D.C.L. 2d ed. Oxford, 1882, p. 88.

[2] Dig. l. 17, 29.

[3] 26 N. H. 237.

cases" instanced are not properly characterized by the word void, for as we have said a void act "is a *caput mortuum* and nothing can give it vitality."[1] An expression is especially needed to characterize an act which calls for a change of circumstances and subsequent acts to develop it and render it effectual as the basis of a right.

§ 429. **Void and illegal acts discussed.**—"It is a first principle, and not to be touched, that a contract in order to be binding, must be lawful."[2] As a general rule no right of action can spring out of an illegal contract, whether it is prohibited by positive law or is opposed to public policy or contrary to good morals.[3] A contract *malum in se* and void as being illegal, must be distinguished from a contract which is void for causes not involving moral turpitude or questions of public policy.[4]

An action cannot be maintained to recover back moneys paid in furtherance of an illegal contract. The maxim "*Ex dolo malo non oritur actio*" governs. The court will never lend its aid to a party who founds an action upon an illegal or an immoral act,[5] or upon a breach of faith or disclosure of confidential communications which might compromise or embarrass the government;[6] and where an ille-

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[1] Dewing v. Perdicaries, 96 U. S. 196.

[2] Belding v. Pitkin, 2 Cai. (N. Y.) 149. See Eastham v. Roundtree, 56 Texas 110.

[3] Pease v. Walsh, 39 N. Y. Sup. Ct. 514. "No cause of action can arise from an undertaking prohibited by statute, whether the contract is *malum in se* or *malum prohibitum*." Peck v. Burr, 10 N. Y. 299. So "no resulting trust can spring from an act contrary to public policy or a statute." Eastham v. Roundtree, 56 Texas 114. See Murphy v. Hubert, 16 Pa. St. 56.

[4] The whole doctrine of avoiding contracts for illegality and immorality is founded on public policy. Thomas v. City of Richmond, 12 Wall. 349.

[5] Collins v. Blantern, 1 Smith's Lea. Cas. 7th Am. ed. 667, and cases cited in note; Wheeler v. Russell, 17 Mass. 281; Haynes v. Rudd, 83 N. Y. 251; Dunaway v. Robertson, 95 Ill. 426; Fivaz v. Nicholls, 2 C. B. 501; Nellis v. Clark, 20 Wend. (N. Y.) 24; Smith v. Hubbs, 10 Me. 71; Armstrong v. Toler, 11 Wheat. 258; Peck v. Burr, 10 N. Y. 294. "The sentiment of 'honor among thieves' cannot be enforced in courts of justice." Woodworth v. Bennett, 43 N. Y. 277.

[6] Totten v. United States, 92 U. S. 105.

gal contract has been executed, the court will never lend its aid to enable either party to disturb it.[1] Lord Ellenborough laid it down as a settled rule "that where a contract which is illegal remains to be executed, the court will not assist either party in an action to recover for the non-execution of it."[2] By the common law no person is permitted to take advantage of his own wrong. In such cases the maxim *in pari delicto* applies, and where property has been fraudulently conveyed to a grantee, he will be permitted to retain it as against the grantor, not from any merit of his own, but because the law will not lend its aid to a party seeking to set aside his own fraudulent act.[3] So equity will not decree a specific performance of an agreement by a fraudulent grantee to reconvey the property to the debtor.[4] The person who attempts to cheat others by a fraudulent transfer of his property has no right to complain if he himself is cheated. There is a rugged but wholesome justice in compelling him to take that which he tried to give. It is but even-handed justice to present to the lips of the defrauder the poisoned chalice he had prepared for the lips of others.[5] The doctrine of these cases has a very firm foundation in the law, and the tendency of the courts to exercise a species of criminal jurisdic-

[1] Merritt v. Millard, 4 Keyes (N. Y.) 208; Robinson v. International Life Assur. Co., 42 N. Y. 56; Smith v. Hubbs, 10 Me. 71. The court will "for the sake of the public" take the objection as to the illegality of the transaction, even though the defendant himself does not raise it. Hamilton v. Ball, 2 Irish Eq. 194.

[2] Shiffner v. Gordon, 12 East 304. Compare Brooks v. Martin, 2 Wall. 76.

[3] Schuman v. Peddicord, 50 Md. 562; Nellis v. Clark, 4 Hill (N. Y.) 424; Murphy v. Hubert, 16 Pa. St. 50. See Eastham v. Roundtree, 56 Texas 110.

[4] Walton v. Tusten, 49 Miss. 577; Sweet v. Tinslar, 52 Barb. (N. Y.) 271; Canton v. Dorchester, 8 Cush. (Mass.) 525; Grider v. Graham, 4 Bibb. (Ky.) 70; Baldwin v. Cawthorne, 19 Vesey 166; Ellington v. Currie, 5 Ired. Eq. (N. C.) 21; Dunaway v. Robertson, 95 Ill. 419; Ryan v. Ryan, 97 Ill. 38. See Chap. XXVI., *supra*.

[5] See Ruckman v. Ruckman, 32 N. J. Eq. 260; Baldwin v. Campfield, 8 N. J. Eq. 897; Tantum v. Miller, 11 N. J. Eq. 551; Marlatt v. Warwick, 19 N. J. Eq. 454; Gill v. Henry, 95 Pa. St. 388; Williams v. Williams, 34 Pa. St. 312; Sherk v. Endress, 3 W. & S. (Pa.) 255.

tion, and punish fraudulent grantors, has been carried so far that, in Cameron v. Romele,[1] the Supreme Court of Texas intimate that a conveyance made with a fraudulent motive, though under a mistake as to the liability of the grantor for the debt, caused by the fraudulent representations of the grantee, will not be set aside at the instance of the grantor.

§ 430. **Policy of the law.**—These rules are promulgated as best calculated to frustrate the designs of persons who engage in fraudulent and illegal transactions. Where the parties have contracted to execute or perform the act, the policy of the law in withholding relief is to prevent the contemplated wrong; where the transaction has been consummated, the intention of denying redress, or of refusing to disturb or unravel the act, is to punish the wrong-doer by leaving him to the consequences of his folly and misconduct.[2] The salutary effect upon the community of the rigid enforcement of these rules and principles can scarcely be overestimated. As to the prohibited acts the parties are, so to speak, attainted, practically stripped of all right to redress by judicial process, and of the power of appeal to the courts. The enforcement of this doctrine of non-recourse to the courts is more deadly and effectual than an independent criminal prosecution, founded upon the contemplated or consummated public wrong, for by this means the illegal transaction itself, out of which the parties had hoped to profit, crumbles to pieces. "He that hath committed iniquity shall not have equity."[3]

§ 431. **Guilty knowledge.**—The general principles relating to illegality in acts and contracts may be variously illus-

[1] 53 Texas, 238.

[2] See Smith v. Hubbs, 10 Me. 71; Bolt v. Rogers, 3 Paige (N. Y.) 154; Miller v. Marckle, 21 Ill. 152; Dunaway v. Robertson, 95 Ill. 426; Eastham v. Roundtree, 56 Texas 110.

[3] Bispham's Equity, p. 60; Francis' Maxims, p. 5. See Cadman v. Horner, 18 Ves. 10; Creath v. Sims, 5 How. 192; Bleakley's Appeal, 66 Pa. St. 191; Blystone v. Blystone, 51 Pa. St. 373.

trated. Thus, in the words of Chief-Justice Eyre in Lightfoot v. Tenant,[1] "the man who sold arsenic to one who he knew intended to poison his wife with it, would not be allowed to maintain an action upon his contract. The consideration of the contract in itself good, is there tainted with turpitude, which destroys the whole merit of it. . . . . No man ought to furnish another with the means of transgressing the law, knowing that he intends to make that use of them." Of this declaration Judge Story said: "The wholesome morality and enlarged policy of this passage make it almost irresistible to the judgment; and, indeed, the reasoning seems positively unanswerable."[2] No one can hesitate to say that such a man voluntarily aids in the perpetration of the offense, and morally speaking is almost, if not quite, as guilty as the principal offender. Lightfoot v. Tenant was followed by Lord Ellenborough in Langton v. Hughes,[3] where a druggist sold drugs of a noxious and unwholesome nature to a brewer, knowing that they were to be used in his brewery contrary to law, and it was held that he could not recover the price. It was also relied upon in Cannan v. Bryce,[4] in which case it was decided that money lent to a man to enable him to settle his losses on an illegal stock-jobbing transaction, could not be recovered back. Chief-Justice Abbott said: "If it be unlawful in one man to pay, how can it be lawful for another to furnish him with the means of payment? . . . . The means were furnished with a full knowledge of the object to which they were to be applied, and for the express purpose of accomplishing that object." This is an extreme case, for the lender had no interest in the unlawful transaction, but merely loaned the money with full knowledge of the object for which it was borrowed. The cases which we have been reviewing are followed and relied upon in

[1] 1 Bos. & P. 551. See Hanauer v. Doane, 12 Wall. 342–346.

[2] Story's Conflict of Laws, § 253.

[3] 1 M. & S. 593.

[4] 3 Barn. & Ald. 179.

Hanauer v. Doane,[1] and in the case of De Groot v. Van Duzer.[2] In the latter case Chancellor Walworth observes, that the "cases in which an independent contract has been held void from a mere knowledge of the fact of the illegal end in view, proceed upon the ground that the party having such knowledge intended to aid the illegal object at the time he made the contract."[3]

§ 432. **Illegal acts.**—Within the condemned category of illegal acts may be instanced an agreement to pay for supporting for election a candidate for sheriff;[4] for resigning a public position to make room for another;[5] for not bidding at a sheriff's sale of real property;[6] for not bidding for articles to be sold by the government at auction;[7] for

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[1] 12 Wall. 348.

[2] 20 Wend. (N. Y.) 397.

[3] *Cases distinguished.*—"There are cases to the contrary; but they are either cases where the unlawful act contemplated to be done was merely *malum prohibitum*, or of inferior criminality; or cases in which the unlawful act was already committed, and the loan was an independent contract, made, not to enable the borrower to commit the act, but to pay obligations which he had already incurred in committing it. Of the latter class was the case of Armstrong v. Toler, 11 Wheat. 258; of the former, Hodgson v. Temple, 5 Taunt. 181. . . . . In Hodgson v. Temple, where a buyer of spirituous liquors was known to be carrying on a rectifying distillery and a retail liquor shop at the same time, contrary to law, the vendor of the spirits was held entitled to recover the price. Sir James Mansfield said: 'The merely selling goods, knowing that the buyer will make an illegal use of them, is not sufficient to deprive the vendor of his just right of payment, but to effect that, it is necessary that the vendor should be a sharer in the illegal transaction.' This seems to have been the view taken by the judge who tried this cause below. . . . . In our judgment it is altogether too narrow a view of the responsibility of a vendor in such a case as the present. Where to draw the precise line between the cases, in which the vendor's knowledge of the purchaser's intent to make an unlawful use of the goods will vitiate the contract, and those in which it will not, may be difficult. Perhaps it cannot be done by exact definitions. . . . . It is certainly contrary to public policy to give the aid of the courts to a vendor who knew that his goods were purchased, or to a lender who knew that his money was borrowed, for the purpose of being employed in the commission of a criminal act, injurious to society, or to any of its members. This is all that we mean to decide in this case." Hanauer v. Doane, 12 Wall. 348.

[4] Swayze v. Hull, 8 N. J. Law 54.

[5] Eddy v. Capron, 4 R. I. 395; Parsons v. Thompson, 1 H. Bl. 322.

[6] Jones v. Caswell, 3 Johns. Cas. (N. Y.) 29.

[7] Doolin v. Ward, 6 Johns. (N. Y.) 194.

not bidding for a contract to carry the mail on a specified route;[1] to pay a person for his aid and influence in procuring an office, and for not being a candidate himself;[2] for procuring a contract from the government;[3] for lobbying services;[4] for procuring signatures to a petition to the governor for a pardon;[5] for securing a secret advantage over other creditors in a composition proceeding;[6] to sell land to a particular person when the surrogate's order to sell should have been obtained;[7] to pay for suppressing evidence and compounding a felony;[8] to convey and assign a part of what should come from an ancestor by descent, devise, or distribution;[9] to pay for promoting a marriage;[10] or to influence the disposition of property by will in a particular way.[11] Lord Mansfield in Smith v. Bromley,[12] decided in 1760, laid down the doctrine which has since been followed, substantially in these words: If the act is in itself immoral, or a violation of the general laws of public policy, both parties are *in pari delicto*, but where the law violated is calculated for the protection of the subject against oppression, extortion, and deceit, and the defendant takes advantage of the plaintiff's condition or situation, then the plaintiff shall recover. Mr. Frere, in

[1] Gulick v. Bailey, 10 N. J. Law 87.

[2] Gray v. Hook, 4 N. Y. 449. See Trist v. Child, 21 Wall. 441.

[3] Tool Co. v. Norris, 2 Wall. 45.

[4] Trist v. Child, 21 Wall. 441.

[5] Hatzfield v. Gulden, 7 Watts (Pa.) 152.

[6] Bliss v. Matteson, 45 N. Y. 22, 26; Greenwood v. Lidbetter, 12 Price 183; Smith v. Stone, 4 Gill & J. (Md.) 310, 322; Bean v. Amsinck, 10 Blatchf. 361; Partridge v. Messer, 14 Gray (Mass.) 181; Huntington v. Clark, 39 Conn. 540, 551; Harvey v. Hunt, 119 Mass. 279, 283; Alsager v. Spalding, 4 Bing. N. C. 407; Howden v. Haigh, 11 Adol. & E. 1033; Smith v. Cuff, 6 M. & S. 160.

[7] Bridgewater v. Brookfield, 3 Cow. (N. Y.) 299.

[8] Collins v. Blantern, 2 Wils. 347; Haynes v. Rudd, 83 N. Y. 251; Fivaz v. Nicholls, 2 C. B. 501.

[9] Boynton v. Hubbard, 7 Mass. 112.

[10] Scribblehill v. Brett, 4 Bro. P. C. 144; Arundel v. Trevillian, 1 Chan. Rep. 47.

[11] Debenham v. Ox, 1 Ves. Sen. 276. See also Addison on Cont. 91; 1 Story's Eq., ch. 7; Collins v. Blantern, 1 Smith's Lea. Cas. 676, American notes. See generally Trist v. Child, 21 Wall. 449; Meguire v. Corwine, 101 U. S. 108.

[12] 2 Doug. 691 n. See Thomas v. City of Richmond, 12 Wall. 355.

a note to Smith v. Bromley,[1] says that a recovery can be had as for money had and received (1st) where the illegality consists in the contract itself, and that contract is not executed—in such case there is a *locus pœnitentiæ*, the *delictum* is incomplete, and the contract may be rescinded by either party—(2d) where the law that creates the illegality in the transaction was designed for the coercion of one party and the protection of the other; or where the one party is the principal offender and the other only criminal from a constrained acquiescence in such illegal conduct. In such cases there is no *parity of delictum* at all between the parties, and the party so protected by the law, or so acting under compulsion, may at any time resort to the law for his remedy, though the illegal transaction be completed. Illegality, as applied to legal actions, denotes a "complete defect in the proceedings,"[2] and signifies something contrary to the principles of law as distinguished from mere rules of procedure. "A transaction originally unlawful cannot be made any better by being ratified."[3] Thus a contract relating to trading with an enemy cannot be made lawful by any ratification.[4] No principle is better settled than that contracts which contravene the law are void, and that the court will never lend its aid for their enforcement. Illegal contracts are not such only as stipulate for something that is unlawful; but, where the intention of one of the parties is to enable the other to violate the law, the contract is corrupted by such illegal intention, and is void.[5] It was so held where the consideration for a note was the delivery of a quantity of guns which the payee knew would

[1] 2 Doug. 697a. See Thomas v. City of Richmond, 12 Wall. 355.

[2] Tidds' Pr. 435. See *Ex parte* Gibson, 31 Cal. 625.

[3] United States v. Grossmayer, 9 Wall. 75.

[4] United States v. Grossmayer, 9 Wall. 75.

[5] Tatum v. Kelley, 25 Ark. 209; Pratt v. Adams, 7 Paige (N. Y.) 615; Branch Bank v. Crocheron, 5 Ala. 250; Beach v. Kezar, 1 N. H. 184; Steele v. Curle, 4 Dana (Ky.) 381; Girarday v. Richardson, 1 Esp. 13; Langton v. Hughes, 1 M. & S. 593; Lightfoot v. Tenant, 1 Bos. & P. 551.

be used in aid of the rebellion. A recovery on the note was defeated on the ground that the payee of the note "concurred with and actively promoted the unlawful and treasonable purpose of the defendants."[1] "No crime is greater than treason,"[2] and, as has been seen,[3] any transaction or act tending to foster and aid rebellion is void in the sense of being illegal, and cannot be made the foundation of any rights.[4]

A promise by a married person to marry is void,[5] as is also any promise predicated upon illicit intercourse or immoral conduct.[6]

§ 433. **Presumption of legality.**—It may be observed that the presumption obtains that the parties do not intend to violate the law,[7] and where a contract is capable of two constructions, the one making it valid and the other void, the first will be adopted.[8] The purpose of the rule denying relief upon illegal contracts is, not to shield the defendant, but on the contrary to refrain from lending aid to a guilty plaintiff, who will not be permitted to approach the altar of justice with unclean hands.[9] Hence if the plaintiff and defendant were to change sides and the defendant was to bring an action against the plaintiff, the latter would then

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[1] Tatum v. Kelley, 25 Ark. 212. S. P. Ruddell v. Landers, 25 Ark. 238; McMurtry v. Ramsey, 25 Ark. 349; Booker v. Robbins, 26 Ark. 660.

[2] Hanauer v. Doane, 12 Wall. 347.

[3] See § 424.

[4] Keith v. Clark, 97 U. S. 464; Dewing v. Perdicaries, 96 U. S. 195.

[5] Drennan v. Douglas, 102 Ill. 341. See Noice v. Brown, 39 N. J. Law 133.

[6] Goodall v. Thurman, 1 Head (Tenn.) 209, 218; Baldy v. Stratton, 11 Pa. St. 316; Hanks v. Naglee, 54 Cal. 51; Trovinger v. McBurney, 5 Cow. (N. Y.) 253.

[7] Marsh v. Whitmore, 21 Wall. 178; Foster v. Rockwell, 104 Mass. 167; Lorillard v. Clyde, 86 N. Y. 387; Bessent v. Harris, 63 N. C. 542; Curtis v. Gokey, 68 N. Y. 304; Mittelholzer v. Fullarton, 6 Q. B. 989. See §§ 5, 6.

[8] Kenton Co. Court v. Bank Lick T. Co., 10 Bush (Ky.) 529; Lorillard v. Clyde, 86 N. Y. 387; Mayor of Norwich v. Norfolk R.R. Co., 4 El. & B. 397; Curtis v. Gokey, 68 N. Y. 304; Archibald v. Thomas, 3 Cow. (N. Y.) 284; Hunter v. Anthony, 8 Jones' Law (N. C.) 385; Peckham v. Haddock, 36 Ill. 38; Merrill v. Melchior, 30 Miss. 516; Patrick v. Grant, 14 Me. 233; Williams v. East India Co., 3 East 192.

[9] See Nellis v. Clark, 4 Hill (N. Y.) 426; Bartle v. Coleman, 4 Pet. 184.

have the advantage; for where both parties are equally at fault, *potior est conditio defendentis*.[1] The policy of the law, as we have seen, is to leave the parties in all such cases without remedy against each other,[2] not as a protection to the defendant, but as a disability or punishment inflicted upon the plaintiff.[3] "Where there is turpitude the law will help neither."[4]

§ 434. **Void in part, void in toto.**—Where claims for services honestly rendered, which would otherwise be just, are blended and confused with those which are forbidden, the whole is a unit and indivisible; that which is bad destroys that which is good, and they perish together.[5] So a mortgage voidable by reason of an intention participated in by both parties to hinder, delay, and defraud the mortgagor's creditors is fraudulent *in toto*, and cannot be supported as against creditors, even to the extent of an actual debt covered by such mortgage.[6] And in New York a mortgage, which is fraudulent by reason of provisions contained in it, allowing the mortgagor to sell merchandise covered by it, in the usual course of trade, is ineffectual as to every other kind of property embraced in it. The fraudulent portion vitiates the entire instrument.[7] And as a general rule a deed which is fraudulent in part as to creditors will be declared void *in toto*.[8]

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[1] Holman v. Johnson, Cowp. 341.

[2] Horton v. Buffinton, 105 Mass. 400.

[3] Myers v. Meinrath, 101 Mass. 367.

[4] Trist v. Child, 21 Wall. 452.

[5] Meguire v. Corwine, 101 U. S. 111; Trist v. Child, 21 Wall. 441.

[6] See Weeden v. Hawes, 10 Conn. 50; Beall v. Williamson, 14 Ala. 55; Sommerville v. Horton, 4 Yerg. (Tenn.) 541; Hyslop v. Clarke, 14 Johns. (N. Y.) 458; Holt v. Creamer, 34 N. J. Eq. 187.

[7] Russell v. Winne, 37 N. Y. 591. See Goodrich v. Downs, 6 Hill (N. Y.) 438; Jackson v. Packard, 6 Wend. (N. Y.) 415; Harman v. Hoskins, 56 Miss. 142; Horton v. Williams, 21 Minn. 187.

[8] Holt v. Creamer, 34 N. J. Eq. 187; Mead v. Combs, 19 N. J. Eq. 112; Roberts on Fraud. Conv. 521. See § 194. A grantor cannot recognize the grantee's possession of an instrument of transfer as valid for some purposes and disclaim it as being otherwise nugatory, especially when to do so would result in an injury to an innocent party. Cotton v. Gregory, 10 Neb. 129. It has been said that "no one

§ 435. **Void acts which are not illegal.**—While an illegal contract is void it does not necessarily follow that every void contract is illegal in the full sense of that word, or that all the disabilities incident to an illegal act pertain to a void act.[1] Thus, the case of money paid under a contract void by statute, but not illegal in its full sense, is different from a purely illegal act.[2] If the act is not *malum in se* it may afford a basis upon which an appeal may be made to the courts. The distinction may be indicated in a variety of ways, some of which will be considered.

§ 436. **Acts void by statute of frauds.**—Contracts void by the statute of frauds afford an illustration.[3] A contract which comes within the act to prevent frauds and perjuries is not entirely void. It is valid to some purposes or indeed to every purpose, except that an action at law cannot be sustained for its breach, or a bill in chancery to compel its execution. If it is fulfilled by the parties it is as effectual as any other contract. If it is dissolved, precisely the same consequences follow.[4] A verbal agreement is of

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can at the same time insist that a contract is in force and is not in force, nor recover on a basis which his proceedings contradict; and whilst a voidable transaction remains unavoided it operates as one that is binding; and no action that contemplates it as one which has been avoided can be maintained." Campbell v. Kuhn, 45 Mich. 518; s. c. 40 Am. Rep. 479. Judge Comstock said, however, in Curtis v. Leavitt, 15 N. Y. 96: "A doctrine which is expressed in the words 'void in part, void in toto,' has often found its way into books and judicial opinions as descriptive of the effect which a statute may have upon deeds and other instruments which have in them some forbidden vice. There is, however, no such general principle of law as the maxim would seem to indicate. On the contrary, the general rule is, that if the good be mixed with the bad it shall nevertheless stand, provided a separation can be made. The exceptions are: First, where a statute, by its express terms, declares the whole deed or contract void on account of some provision which is unlawful; and second, where there is some all-pervading vice, such as fraud, for example, which is condemned by the common law, and avoids all parts of the transaction because all are alike infected."

[1] See Parkersburg v. Brown, 106 U. S. 487; Davis v. Old Colony R.R. Co., 131 Mass. 258; Day v. N. Y. Central R.R. Co., 51 N. Y. 590.

[2] Leake's Dig. Law of Cont. 763; Jessopp v. Lutwyche, 10 Exch. 614; Rosewarne v. Billing, 15 C. B. N. S. 316.

[3] Pawle v. Gunn, 4 Bing. N. C. 445.

[4] McCampbell v. McCampbell, 5 Litt. (Ky.) 92.

course valid unless the statute of frauds interferes.[1] If a party pays money, or renders services, or delivers property upon the faith of an agreement condemned by the statute of frauds, the money may be recovered back in an action for money had and received,[2] or judgment may be rendered for the value of the services or the property, upon an implied assumpsit to pay, provided the party can show a willingness to perform the agreement on his part, and that the other party has repudiated or refused to perform it.[3] So a recovery may be had upon a *quantum meruit* where services were rendered under such an agreement.[4] The law in such cases recognizes the existence of the agreement and treats it as morally binding.[5] There is no turpitude. The

[1] Platt v. Hudson River R.R. Co., 21 N. Y. 308. In this case Selden, J., said: "A contract to make and execute a certain written agreement, the terms of which are specific, and mutually understood, is in all respects as valid and obligatory, where no statutory objection interposes, as the written contract itself would be, if executed. If, therefore, it should appear, from the evidence, that the minds of the parties had met; that a proposition for a contract had been made by one party and accepted by the other; that the terms of this contract were, in all respects, definitely understood and agreed upon, and that a part of the mutual understanding was, that a written contract, embodying those terms, should be drawn and executed by the respective parties, this is an obligatory contract, which neither party is at liberty to refuse to perform. Such a case cannot be distinguished from that of an agreement to execute a lease. If two parties negotiate for a lease of certain premises, and they agree upon the terms and conditions of the lease, and that a written lease shall be drawn and executed, embracing those terms, this is not a lease, but it is a contract, which, whenever the statute of frauds does not interfere to prevent, can be enforced; and which the courts will compel the parties specifically to perform. The books are full of such cases, and it can hardly be necessary to refer to them at length. It is required, in such cases, that the preliminary agreement to execute the lease should itself be in writing; but this is merely to avoid the effect of the statute of frauds. Wherever there is anything to take the case out of the operation of the statute the agreement, although by parol, will be enforced."

[2] Allen v. Booker, 2 Stew. (Ala.) 21; Kidder v. Hunt, 1 Pick. (Mass.) 328; Hambell v. Hamilton, 3 Dana (Ky.) 501.

[3] Day v. New York Central R.R. Co., 51 N. Y. 590; S. C., second appeal, 89 N. Y. 616; Gillet v. Maynard, 5 Johns. 85; King v. Brown, 2 Hill (N. Y.) 485; Cook v. Doggett, 2 Allen (Mass.) 439; Erben v. Lorillard, 19 N. Y. 299; Richards v. Allen, 17 Me. 296.

[4] Shute v. Dorr, 5 Wend. (N. Y.) 204.

[5] In Abbott v. Draper, 4 Denio (N. Y.) 51, Chief-Justice Bronson says: "Although the statute declares a parol

principle is that a party who has received anything of value under an agreement of this character, and then has refused to perform it, ought in justice to make restitution, and hence the law, for the purpose of doing justice to the other party, will imply an assumpsit.[1] And where a contract which might have been avoided under the statute has been fully executed, the provisions of the statute do not apply.[2] When a verbal contract is performed by the conveyance of land on the one part, there can be no difficulty in compelling the equivalent from the other contracting party. A court of equity can decree specific performance if that is needed, and a court of law can allow a recovery of the purchase-money if that is all that is sought.[3]

§ 437. — In King v. Brown[4] the plaintiff was allowed to recover for work performed for the defendant, though the work was to have gone in payment for land to be conveyed to him by the defendant under a contract void by the statute of frauds. Nelson, J., said: "The contract being void and incapable of enforcement in a court of law, the party paying the money or rendering the services in pursuance thereof, may treat it as a nullity and recover the money or value of the services rendered under the common counts. This is the universal rule in cases where the contract is void for any cause not *illegal*, if the defendant be in default." The contract itself may be used for the purposes of defense as a shield to protect the defendant against

contract for the sale of lands void, it does not make it illegal. It is not a corrupt or wicked agreement; nor does it violate any principle of public policy. Parties are at liberty to act under such contracts if they think proper."

[1] Day v. New York Central R.R. Co., 51 N. Y. 590. See Greer v. Greer, 18 Me. 16; Davenport v. Mason, 15 Mass. 85.

[2] McCue v. Smith, 9 Minn. 252; Pawle v. Gunn, 4 Bing. N. C. 445; Price v. Leyburn, Gow 109; Randall v. Turner, 17 Ohio St. 262; Brown v. Bellows, 4 Pick. (Mass.) 179; Fitzsimmons v. Allen, 39 Ill. 440.

[3] Thomas v. Dickinson, 12 N. Y. 364; Holland v. Hoyt, 14 Mich. 238; Butler v. Lee, 11 Ala. 885; Wilkinson v. Scott, 17 Mass. 249; Linscott v. McIntire, 15 Me. 201; Gibson v. Wilcoxen, 16 Ind. 333; Bowen v. Bell, 20 Johns. (N. Y.) 338.

[4] 2 Hill (N. Y.) 487.

unconscionable demands and claims growing out of it.[1] So a party in possession under a void parol lease may show that he is not a trespasser,[2] and may even maintain trespass against the owner.[3]

It will thus be seen that a contract is not void under the policy of the statute of frauds, because the parties are *in pari delicto*, or have negotiated with reference to matters involving moral turpitude, but because they have failed to provide themselves with such legal evidence of the existence of the contract as can be effectually produced in the courts. It is not the intention or policy of the law to do anything further than to prevent the enforcement of the contract; there is no guilt to be punished by denying or withholding redress to one of the parties to such a contract when he has parted with a portion of the consideration on the faith of the void act. The statute of frauds, it may be observed, "was not made to encourage frauds and cheats."[4] The ground upon which the court interposes its aid in a clear case of part performance of a verbal agreement is, that to withhold it would be to suffer a party seeking to shelter himself under the statute of frauds to himself commit a fraud.[5]

Under this statute interests in realty can only be transferred by an instrument in writing, yet courts of equity will uphold parol sales and gifts of real estate which have been followed by certain acts of part performance, especially where the donee or vendee has made improvements. In

[1] See Gray v. Gray, 2 J. J. Mar. (Ky.) 21; Basford v. Pearson, 9 Allen (Mass.) 387; Roberts v. Tennell, 3 Mon. (Ky.) 247; Philbrook v. Belknap, 6 Vt. 383; Burlingame v. Burlingame, 7 Cow. (N. Y.) 92; King v. Brown, 2 Hill (N. Y.) 485. See McCampbell v. McCampbell, 15 Am. Dec. 63, notes.

[2] Roberts v. Tennell, 3 Mon. (Ky.) 248.

[3] Wilber v. Paine, 1 Ohio 251.

[4] See 2 Lomax's Digest, 41.

[5] Woods v. Dille, 11 Ohio 455; Ryan v. Dox, 34 N. Y. 307; Rose v. Bates, 12 Mo. 30; Jackson v. Bull, 2 Cai. Cases (N. Y.) 301. But to entitle a party to a decree of specific performance on a parol contract it must be clearly proved. Whitridge v. Parkhurst, 20 Md. 62; Church of the Advent v. Farrow, 7 Rich. Eq. (S. C.) 378; Lobdell v. Lobdell, 36 N. Y. 327.

such cases rights of action may be said to have arisen out of void acts.[1]

§ 438. Void corporate acts.—The principle applicable to acts or contracts which are void or incapable of enforcement, or impossible of execution by reason, for instance, of want of power in the parties to contract with reference to the subject-matter, is illustrated in the case of Chapman v. County of Douglas.[2] In that case it appeared that a county had purchased lands, and, pursuant to the contract with the vendor, had issued securities for a portion of the purchase-money without authority of law. The court decided that the vendor was entitled to restitution of the title upon surrendering the void securities. Matthews, J., said: "The illegality in the contract related, not to its substance, but only to a specific mode of performance, and does not bring it within that class mentioned by Mr. Justice Bradley in Thomas v. City of Richmond.[3] The purchase itself, as we have seen, was expressly authorized. The agreement for definite times of payment and for security alone was not authorized. It was not illegal in the sense of being prohibited as an offense; the power in that form was simply withheld. The policy of the law extends no further than merely to defeat what it does not permit, and imposes upon the parties no penalty." The court said that the case fell within the rule, that "where no penalty is imposed, and the intention of the legislature appears to be simply that the agreement is not to be enforced, there neither the agreement itself nor the performance of it is to be treated

[1] See "Verbal Sales and Gifts of Real Estate," by Hon. Jno. W. Daniel, 7 Va. L. J. 193; Rhea v. Jordan, 28 Gratt. (Va.) 683; Tracy v. Tracy, 14 West Va. 243; Freeman v. Freeman, 43 N. Y. 34; Young v. Glendenning, 6 Watts (Pa.) 510; Galbraith v. Galbraith, 5 Kansas 409; Kurtz v. Hibner, 55 Ill. 521; Hardesty v. Richardson, 44 Md. 617; Neale v. Neales, 9 Wall. 1; Merithew v. Andrews, 44 Barb. (N. Y.) 200; Brown v. Jones, 46 Barb. (N. Y.) 400; Miller v. Ball, 64 N. Y. 292; Hutchins v. Hutchins, 98 N. Y. 65.

[2] 107 U. S. 356. See Salt Lake City v. Hollister, 118 U. S. 263.

[3] 12 Wall. 349, 356.

as unlawful for any other purpose."[1] This is further illustrated in Hitchcock v. Galveston,[2] where a recovery was allowed for the value of the benefit conferred upon a municipal corporation, notwithstanding that the contract to pay in bonds was held to be illegal and void, but indeed for that very reason. "It matters not," said Strong, J., "that the promise was to pay in a manner not authorized by law. If payments cannot be made in bonds because their issue is *ultra vires*, it would be sanctioning rank injustice to hold that payment need not be made at all. Such is not the law. The contract between the parties is in force, so far as it is lawful." The legal liability springs from the moral duty to make restitution.[3] The case of Parkersburg v. Brown[4] furnishes an additional illustration of this distinction ably and lucidly set forth. It appeared that an act of the legislature of West Virginia authorized the city of Parkersburg to issue bonds, with a view to lending the same to persons engaged in manufacturing. There was no provision in the constitution of West Virginia which authorized the levying of taxes to be used to aid private persons in conducting private manufacturing enterprises. The Supreme Court held that in the absence of such a constitutional provision, the bonds were absolutely void, for the reason that taxation for their payment would not be for a public purpose, but would be taking private property of one person for the private use of another.[5] The city had

[1] Pollock's Principles of Contract, 264. See Johnson v. Meeker, 1 Wis. 436; Morville v. American Tract Society, 123 Mass. 129–137.

[2] 96 U. S. 341; S. P. Chapman v. County of Douglas, 107 U. S. 357.

[3] See, also, State Board of Agriculture v. Citizens' Street Railway Co., 47 Ind. 407; Clark v. Saline Co., 9 Neb. 516; Pimental v. City of San Francisco, 21 Cal. 362.

[4] 106 U. S. 487.

[5] *No taxation for private purposes.*— Taxes are burdens or charges imposed by the legislature upon persons or property to raise money for public purposes. Cooley's Constitutional Limitations, p. 479. See Northern Liberties v. St. John's Church, 13 Pa. St. 104; Hanson v. Vernon, 27 Iowa 47; Whiting v. Sheboygan, etc. R.R. Co., 25 Wis. 188. Money cannot be raised by taxation to loan to individuals to establish saw or grist mills (Allen v. The Inhab-

taken possession of certain property which had been given as security for the void bonds. The court decided that, notwithstanding the invalidity of the bonds and of the trust, the holders of them had the right to reclaim this property, and to call upon the city to account for it. Blatchford, J., said: "The enforcement of such right is not in affirmance of the illegal contract, but is in disaffirmance of it, and seeks to prevent the city from retaining the benefit which it has derived from the unlawful act.[1] There was no illegality in the mere putting of the property by the O'Briens in the hands of the city. To deny a remedy to reclaim it is to give effect to the illegal contract. The

itants of Jay, 66 Me. 124); or to enable private citizens to rebuild portions of a city destroyed by fire (Lowell v. Boston, 111 Mass. 454); or to aid private schools (Jenkins v. Andover, 103 Mass. 94; Curtis v. Whipple, 24 Wis. 350). See Whiting v. Sheboygan, etc. R.R. Co., 25 Wis. 188. In Cole v. La Grange, 113 U. S. 6, Mr. Justice Gray said: "The general grant of legislative power in the Constitution of a State does not enable the legislature, in the exercise either of the right of eminent domain, or of the right of taxation, to take private property, without the owner's consent, for any but a public object. Nor can the legislature authorize counties, cities, or towns to contract for private objects, debts which must be paid by taxes. . . . . In Loan Association v. Topeka, 20 Wall. 655, bonds of a city, issued, as appeared on their face, pursuant to an act of the legislature of Kansas, to a manufacturing corporation to aid it in establishing shops in the city for the manufacture of iron bridges, were held by this court to be void, even in the hands of a purchaser in good faith and for value. A like decision was made in Parkersburg v. Brown, 106 U. S. 487. The decisions in the courts of the States are to the same effect. Allen v. Inhabitants of Jay, 60 Me. 124; Lowell v. Boston, 111 Mass. 454; Weismer v. Village of Douglas, 64 N. Y. 91; Matter of Eureka Basin W. & M. Co., 96 N. Y. 42; Bissell v. City of Kankakee, 64 Ill. 249; English v. People, 96 Ill. 566; Central Branch U. P. R.R. Co. v. Smith, 23 Kans. 745. We have been referred to no opposing decision. The cases of Hackett v. Ottawa, 99 U. S. 86, and Ottawa v. National Bank, 105 U. S. 342, were decided, as the Chief-Justice pointed out in Ottawa v. Carey, 108 U. S. 110, 118, upon the ground that the bonds in suit appeared on their face to have been issued for municipal purposes, and were therefore valid in the hands of *bona fide* holders." See Livingston County v. Darlington, 101 U. S. 407; Township of Burlington v. Beasley, 94 U. S. 310; Osborne v. County of Adams, 106 U. S. 181; Blair v. Cuming County, 111 U. S. 363; Rogers v. Burlington, 3 Wall. 654; Town of Queensbury v. Culver, 19 Wall. 83; Taylor v. Ypsilanti, 105 U. S. 60; Middleton v. Mullica, 112 U. S. 433.

[1] Citing 2 Com. Cont. 109.

illegality of that contract does not arise from any moral turpitude. The property was transferred under a contract which was merely *malum prohibitum*, and where the city was the principal offender. In such a case the party receiving may be made to refund to the person from whom it has received property for the unauthorized purpose, the value of that which it has actually received."[1]

§ 439. **Consummated illegal acts.**—There is a marked and settled distinction in law between executory and executed contracts of an illegal character.[2] It has been laid down by the New York Court of Appeals as a test that whether a demand connected with an illegal transaction is capable of being enforced at law, depends upon whether the party requires any aid from the illegal transaction to establish the case.[3] If the cause of action is unconnected with the illegal act, and is founded upon a distinct and collateral consideration, it will not be affected by the former unlawful conduct of the parties.[4] "A new contract, founded on a new consideration, although in relation to property respecting which there had been unlawful transactions between the parties, is not itself unlawful."[5] The law, as we have seen, is settled, that a contract wicked in itself or prohibited by law, cannot be enforced in the courts. Chief-Justice Marshall, commenting upon the subject, said: "How far this principle is to affect subsequent or collateral contracts, the direct and immediate consideration of which is not immoral or illegal, is a question of considerable intricacy, on which many controversies have arisen, and

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[1] Parkersburg v. Brown, 106 U. S. 503, citing White v. Franklin Bank, 22 Pick. (Mass.) 181; Morville v. American Tract Society, 123 Mass. 129; Davis v. Old Colony Railroad Co., 131 Mass. 258; *In re* Cork and Youghal Railway Co., L. R. 4 Ch. App. 748.

[2] Merritt v. Millard, 4 Keyes (N. Y.) 213.

[3] Woodworth v. Bennett, 43 N. Y. 276; Clements v. Yturria, 81 N. Y. 291; Chitty on Cont. 657. See Phalen v. Clark, 19 Conn. 421; Northwestern Ins. Co. v. Elliott, 7 Sawy. 22.

[4] Phalen v. Clark, 19 Conn. 431; Armstrong v. Toler, 11 Wheat. 258.

[5] Armstrong v. Toler, 11 Wheat. 269.

many decisions have been made."[1] In Faikney v. Reynous,[2] the plaintiffs and one Richardson, were jointly concerned in certain contracts prohibited by law, on which a loss was sustained, the whole of which was paid by the plaintiffs, and a bond given to secure the repayment of Richardson's proportion of it. In a suit on this bond the defendant pleaded the statute prohibiting the original transaction, but the court held on demurrer that the plaintiff was entitled to recover. Lord Mansfield gave his opinion on the general ground, that if one person apply to another to pay his debt, whether contracted on the score of usury or for any other purpose, he is entitled to recover it back again. This is a strong case to show that a subsequent contract not stipulating for a prohibited act, although for money advanced in satisfaction of an unlawful transaction, may be sustained in a court of justice. In Bateman v. Fargason[3] a bill was filed to reopen a settlement of accounts upon grounds of usury, undue influence and violated confidence, amounting to a fraudulent imposition by the defendant upon the plaintiff. The plaintiff had executed a deed of his share of certain lands to pay the alleged balance found due the defendant, and had procured his wife to join in the conveyance for the purpose of releasing her dower and homestead rights. The complainant alleged in the bill that he had procured this acquiescence of his wife by coercion, and set forth in detail his angry denunciations of her remonstrances, and his wicked threats to have the defendant, whom the wife detested, appointed guardian for her children, and such other like conduct as procured her signature to the deed. A demurrer was interposed to the bill based upon these allegations of coercion, and the complainant's confession of fraud, and the maxim was invoked

[1] Armstrong v. Toler, 11 Wheat. 272.

[2] 4 Burr. 2069. See Petrie v. Hannay, 3 T. R. 659.

[3] 2 Flippin, 660.

that "he who comes into equity must do so with clean hands." It was decided that this maxim only applied to the conduct of the party in respect to the particular transaction under consideration, which, in this case, was the usury and fraudulent and fictitious items in the settlement, and that the court would not travel outside of the case for the purpose of examining the conduct of the plaintiff in other matters, or questioning his general character for fair dealing.[1] The rule does not refer to general depravity; it must have an immediate and necessary relation to the equity in suit; it must be depravity in a *legal* as well as moral sense.[2] It may be observed of this case that the acts of the complainant in relation to the coercion of his wife were entirely immaterial as regards the merits of the controversy with the defendant. To be available as a ground of avoiding the deed, the wife who was the party aggrieved by the duress, should become an actor.

§ 440. — It may be regarded as settled, that where a party has paid money to a third person, for the use of another, which on account of the illegality of the transaction he was not obliged to pay, such third person cannot interpose the defense of illegality when sued for the money.[3] This principle is based upon the undoubted right of a person to waive the illegality and pay the money, and, when once paid, either to the other party directly, or to a third person for his use, it cannot be recalled, and a third party who was in no way connected with the original transaction cannot avail himself of a defense which his principal waived.[4] In other words, where the illegal object has been accom-

[1] Citing Bispham's Equity, p. 61.

[2] Citing Deering v. Winchelsea, 1 Cox's Eq. 318; Nichols v. Cabe, 3 Head (Tenn.) 92; Sharp v. Caldwell, 7 Humph. (Tenn.) 415; Mulloy v. Young, 10 Humph. (Tenn.) 298; Kelton v. Millikin, 2 Coldw. (Tenn.) 410; Lewis & Nelson's Appeal, 67 Pa. St. 153, 166.

[3] Tenant v. Elliott, 1 Bos. & P. 3; Merritt v. Millard, 4 Keyes (N. Y.) 208; Woodworth v. Bennett, 43 N. Y. 276.

[4] Woodworth v. Bennett, 43 N. Y. 276; Merritt v. Millard, 4 Keyes (N. Y.) 215.

plished, the money or thing which was the price of it may be a legal consideration between the parties for a promise express or implied, and the court will not unravel the transaction to discover its origin.[1] In Gray v. Hook[2] the court said: "The distinction between a void and valid new contract, in relation to the subject-matter of a former illegal one, depends upon the fact whether the new contract seeks to carry out or enforce any of the unexecuted provisions of the former contract, or whether it is based upon a moral obligation growing out of the execution of an agreement which could not be enforced by law, and upon the performance of which the law will raise no implied promise. In the first class of cases no change in the form of the contract will avoid the illegality of the first consideration; while express promises based upon the last class of considerations may be sustained."[3]

§ 441. **Void and voidable marriages.**—The distinction between void and voidable acts appertains in the rules governing marriages. A void marriage is good to no purpose. It may be assailed directly or collaterally, and its invalidity shown at any time and between any parties, either directly or collaterally.[4] The distinction is well stated in Elliott v. Gurr,[5] where the court said: "Civil disabilities, such as a prior marriage, want of age, idiocy, and the like, make the contract void *ab initio*, not merely voidable; these do not dissolve a contract already made, but they render the parties incapable of contracting at all; they do not put

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[1] Planters' Bank v. Union Bank, 16 Wall. 500; *Ex parte* Bulmer, 13 Ves. Jr. 316. See McBlair v. Gibbes, 17 How. 236; Lestapies v. Ingraham, 5 Pa. St. 71; Woodworth v. Bennett, 43 N. Y. 276.

[2] 4 N. Y. 439.

[3] See Woodworth v. Bennett, 43 N. Y. 278.

[4] 1 Bishop's Marriage and Divorce, 6th ed., § 105; Ferlat v. Gojon, Hopk. Ch. (N. Y.) 478, 493; S. C. 14 Am. Dec. 554; Gathings v. Williams, 5 Ired. (N. C.) Law 487; Patterson v. Gaines, 6 How. 592; Fornshill v. Murray, 1 Bland (Md.) 479; S. C. 18 Am. Dec. 344; Mount Holly v. Andover, 11 Vt. 226; Rawdon v. Rawdon, 28 Ala. 565.

[5] 2 Phillim. 19.

asunder those who are joined together, but they previously hinder the junction; and if any persons under these legal incapacities come together, it is a meretricious, and not a matrimonial union, and therefore no sentence of avoidance is necessary." Of course, in the absence of an absolute divorce, no person can remarry while the former husband or wife is alive.[1] Such a marriage is absolutely void. In Glass v. Glass,[2] Chief-Justice Gray, in delivering the opinion of the court, said: "But as he [the first husband] was in fact still living, and the first marriage had not been dissolved by a decree of divorce, the respondent was in law his wife, her second marriage was unlawful, and the information which both parties to it had of the former marriage, and of the circumstances connected with the absence of the former husband, cannot estop either to apply to the court for a decree of nullity."[3] The void marriage imposes no obligation upon either contracting party. Thus, in Patterson v. Gaines,[4] Justice Wayne, in delivering the opinion of the United States Supreme Court, said: "A void marriage imposes no legal restraint upon the party imposed upon from contracting another, though prudence and delicacy do, until the fact is so generally known as not to be a matter of doubt, or until it has been impeached in a judicial proceeding, wherever that may be done."[5]

§ 442. **Irregularities and nullities distinguished.**—An irregularity in the form or manner of conducting a legal

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[1] See notes to Gathings v. Williams, 44 Am. Dec. 54.

[2] 114 Mass. 566.

[3] Citing Miles v. Chilton, 1 Rob. Eccl. 684; Williamson v. Parisien, 1 Johns. Ch. (N. Y.) 389; Zule v. Zule, 1 N. J. Eq. 96; Kenley v. Kenley, 2 Yeates (Pa.) 207; Janes v. Janes, 5 Blackf. (Ind.) 141; Martin v. Martin, 22 Ala. 86.

[4] 6 How. 592.

[5] See Reeves v. Reeves, 54 Ill. 332; Appleton v. Warner, 51 Barb. (N. Y.) 270; Gaines v. Relf, 12 How. 473. If either of the parties at the time of entering into the marriage is *non compos mentis*, it is null and void. See Foster v. Means, 1 Speer's Eq. (S. C.) 569; S. C. 42 Am. Dec. 332; Jenkins v. Jenkins, 2 Dana (Ky.) 103; S. C. 26 Am. Dec. 437; Waymire v. Jetmore, 22 Ohio St. 271; Christy v. Clarke, 45 Barb. (N.Y.) 529. See, especially, note to Gathings v. Williams, 44 Am. Dec. 56.

proceeding consists in a want of adherence to some prescribed rule or form of procedure by omitting to do some act which is necessary for the due and orderly conducting of the proceeding, or by doing it at an unreasonable time or in an improper manner.[1] It is a technical term for every defect in practical proceedings or the mode of conducting an action or defense as distinguishable from defects in pleading,[2] but is limited to such informalities as do not render the act entirely invalid or void *ab initio*. The word should properly be restricted to acts which, in accordance with the *practice* of the court, ought or ought not to be done. But the definition of an irregularity or of the term "irregular process" is in some of the cases as loose and misleading as that applied to the words void or voidable. Thus, it is said, in Doe v. Harter,[3] that "sometimes the term 'irregular process' has been defined to mean process absolutely void, and not merely erroneous and voidable,"[4] and it is further said with much truth that this term has been applied to all process not issued in strict conformity with the law, whether the defects appear upon the face of the process, or by reference to extrinsic facts, and whether such defects render the process absolutely void or only voidable. A defect constituting only an irregularity is one that does not take away the foundation or authority for the proceeding, and does not apply to its whole operation.[5] This is said to distinguish an irregularity from a nullity, and the latter has been termed "the highest degree of an irregularity in the most extensive sense of that term."[6] It may be stated as a general rule,

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[1] Bowman v. Tallman, 2 Rob. (N. Y.) 634; s. c. 19 Abb. Pr. (N. Y.) 86; Bordeaux *ads.* Treasurers, 3 McCord's (S. C.) Law 144; *Ex parte* Gibson, 31 Cal. 625; Salter v. Hilgen, 40 Wis. 365; Downing v. Still, 43 Mo. 317; Macnamara on Nullities, p. 3.

[2] 3 Chit. Gen. Prac., p. 509.

[3] 2 Ind. 253.

[4] Citing Woodcock v. Bennet, 1 Cow. (N. Y.) 735.

[5] Arbourn v. Anderson, 9 Dowl. 595.

[6] Macnamara on Nullities, p. 3.

that in doubtful cases the courts incline to treat the defects in legal proceedings as irregularities rather than as nullities.[1]

§ 443. **Justification under irregular or erroneous process.**—In Day v. Bach[2] the New York Court of Appeals advert to the general principle that void or irregular process furnishes no justification for acts done under it, but recognize the familiar limitation that if the process is irregular only it is merely voidable and not void, and must be vacated and set aside before trespass can be brought. It is believed

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[1] *The distinction further illustrated.*—The distinction between a nullity and an irregularity in court proceedings is discussed, in the Supreme Court of Wisconsin, in the case of Tallman v. McCarty, 11 Wis. 406. The court said: "No order which a court is empowered, under any circumstances in the course of a proceeding, over which it has jurisdiction, to make, can be treated as a nullity merely because it was made improvidently, or in a manner not warranted by law, or the previous state of the case. The only question in such a case is, had the court or tribunal the power, under any circumstances, to make the order or perform the act. If this be answered in the affirmative, then its decision upon those circumstances becomes final and conclusive until reversed by a direct proceeding for that purpose." In *Ex parte* Gibson, 31 Cal. 619, it is held than an error which will render a judgment in a criminal case voidable only, is the want of adherence to some prescribed rule or mode of procedure, in conducting the action or defense. An illegality which renders a judgment in a criminal case void is such an illegality as is contrary to the principles of law, as distinguished from rules of procedure. "An imprisonment under a judgment cannot be unlawful unless that judgment be an absolute nullity; and it is not a nullity if the court has general jurisdiction of the subject." Per Marshall, Ch. J., in *Ex parte* Watkins, 3 Peters 202. See *Ex parte* Gibson, 31 Cal. 619; *Ex parte* Shaw, 7 O. S. 81; People v. Cavanagh, 2 Parker's Cr. R. (N. Y.) 660. A writer has said that it would be irregular to sentence a man to imprisonment in his absence, where the absence was occasioned by the order of the court pronouncing the sentence, while it would be illegal to sentence him to imprisonment for a crime which was punishable by a pecuniary fine only. See Hurd on Habeas Corpus, 331; Petition of Crandall, 34 Wis. 177; *Ex parte* Gibson, 31 Cal. 625. So a judgment of the court will be held void if made in excess of that which by law the court had power to make (*Ex parte* Lange, 18 Wall. 163; People v. Liscomb, 60 N. Y. 559; People v. McLeod, 1 Hill [N. Y.] 377; *Ex parte* Virginia, 100 U. S. 339; Crepps v. Durden, 2 Cowp. 640); or where cumulative sentences and penalties have been illegally imposed (People v. Liscomb, 60 N. Y. 559); or the prisoner is held under an unconstitutional statute (*Ex parte* Siebold, 100 U. S. 371); and the question may be determined on *habeas corpus*. Ibid.

[2] 87 N. Y. 60.

to be equally well settled that if the process was erroneous only it protects the party for acts done under it while in force, and he may justify under it after it has been set aside. The doctrine of trespass by relation has no application in such a case. The distinction between void or irregular and erroneous process is taken in the early case of Turner v. Felgate,[1] which was an action of trespass against a party for taking goods on execution. The judgment was subsequently reversed for the reason (as stated in the report) that it had been unduly obtained, and restitution was awarded. The court decided that the action would lie, "for by the vacating of the judgment it is as if it had never been; and is not like a judgment reversed by error." The same distinction was taken in Parsons v. Loyd.[2] The plaintiff in that case was arrested on a *capias ad respondendum* tested in Trinity term and returnable in Hilary term, Michaelmas term intervening. The writ was set aside for irregularity, and the plaintiff brought an action for false imprisonment against the party who issued it. The latter justified under the process, but the court decided that the writ was no justification. Lord Chief-Justice De Grey said: "There is a great difference between erroneous process and irregular (that is to say, void) process, the first stands valid and good until it be reversed, the latter is an absolute nullity from the beginning; the party may justify under the first until it be reversed; but he cannot justify under the latter, because it was his own fault that it was irregular and void at first." The point that a party may justify under lawful process set aside for error only was distinctly adjudged in Prentice v. Harrison[3] and Williams v. Smith.[4] In the latter case, Willes, J., said: "It by no means follows that because a writ or an attachment is set aside, an action for false imprisonment lies against those who procured it to be issued. If that were so, this

[1] 1 Lev. 95.
[2] 3 Wilson, 345.
[3] 4 Ad. & El. (N. S.) 852.
[4] 14 C. B. (N. S.) 596.

absurd consequence would follow, that every person concerned in enforcing the execution of a judgment would be held responsible for its correctness. Where an execution is set aside on the ground of an erroneous judgment, the plaintiff or his attorney is no more liable to an action than the sheriff who executes the process is." The New York Court of Appeals held that this rule manifestly applies where the process is against property and the alleged trespass is a seizure under it.[1] In Day v. Bach,[2] Chief-Justice Andrews said: "The authorities seem to establish these propositions: First, that a void writ or process furnishes no justification to a party, and he is liable to an action for what has been done under it at any time, and it is not necessary that it should be set aside before bringing the action.[3] Second, if the writ is irregular only, and not absolutely void, as for instance where an execution is issued on a judgment more than a year old, without a *sci. fa.*, no action lies until it has been set aside; but when set aside it ceases to be a protection for acts done under it while in force.[4] Third, if the process was regularly issued in a case where the court had jurisdiction, the party may justify what has been done under it, after it has been set aside for error in the judgment or proceeding; and an action for false imprisonment, in case of arrest, or of trespass for property taken under it, will not lie. Where, however, property has been taken, the party against whom the writ issued is entitled to restitution from the party who sued out the writ, of any property or money of the defendant in his hands."[5]

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[1] Day v. Bach, 87 N. Y. 61.

[2] 87 N. Y. 61.

[3] Citing Brooks v. Hodgkinson, 4 H. & N. 712.

[4] Citing Chapman v. Dyett, 11 Wend. (N. Y.) 31; Blanchenay v. Burt, 4 Ad. & El. (N. S.) 707; Riddel v. Pakeman, 2 C., M. & R. 30.

[5] Citing Jackson v. Cadwell, 1 Cow. (N. Y.) 644; Clark v. Pinney, 6 Cow. (N. Y.) 297; Kissock v. Grant, 34 Barb. (N. Y.) 144; Williams v. Smith, 14 C. B. (N. S.) 596; Reynolds v. Harris, 14 Cal. 667. In Settlemier v. Sullivan, 97 U. S. 448, the United States Supreme Court, in commenting upon Trullenger v. Todd, 5 Oregon 39, where a judgment was held void by reason of

§ 444. Words "erroneous" and "irregular" discussed.— The word "erroneous" in court proceedings seems to be applied to matters which are contrary to law; the word "irregular" to matters contrary to practice. Hence it is said in Wolfe v. Davis,[1] that "an erroneous judgment is one rendered according to the course and practice of the courts, but contrary to law; as where it is for one party when it ought to be for the other; or for too little or too much. An irregular judgment is one contrary to the course and practice of the courts; as a judgment without service of process."[2] The distinction may be further illustrated from Day v. Bach,[3] a case from which we have already quoted extensively. It was shown in that action that a warrant of attachment had been regularly issued, property seized and sold under it, and that the attachment had been vacated upon affidavits which the court considered overcame or explained the facts and charges upon which the process had been granted. Strictly speaking there was no question of irregularity involved. The court in the first instance had reached a wrong conclusion upon contested facts which the appellate tribunal had reversed for error. There had resulted to the plaintiff's assignor, by reason of the attachment and sale thereunder, a serious loss, which the proceeds of the sale when restored to him only partially covered. The court held, however, that the setting aside of the attachment, on the ground stated, did not deprive the defendants of their justification; and it did not cease to be a protection, after it was vacated, for the acts done under it.[4]

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a fatal defect in the proof of service, say: "The court having thus held the judgment void, the only question left for its determination was whether it could entertain an appeal from it, as a void judgment could be disregarded and treated as a nullity whenever any right was claimed under it, whether set aside or not. It maintained the appeal solely for the purpose of reversing the judgment, and thus purging its records."

[1] 74 N. C. 599.

[2] Followed in Koonce v. Butler, 84 N. C. 223.

[3] 87 N. Y. 61.

[4] A plaintiff sought to maintain the action upon the authority of Wehle v. Butler, 61 N. Y. 245; Lyon v. Yates,

The distinctions under discussion are lucidly set forth in Simpson v. Hornbeck,[1] by Parker, J., in these words: "Although a void judgment, or one that is voidable for irregularity, will not, after being set aside, justify the acts of the party done under it before it was set aside, this principle I apprehended has never been applied to a judgment merely erroneous, and reversed for error by a court of review. An irregular judgment is called *voidable* and when set aside is treated as though void from the beginning; for the party himself is held chargeable with the irregularity, while a judgment pronounced by the court, although upon an erroneous view of the law, and subject therefore to be reversed by an appellate tribunal, is never treated as void, but valid for all purposes of protection to the party acting under it before reversal. The fact that in the one case the party is responsible for the irregularity, and in the other whatever of error there is in the judgment is the error of the court, seems to be the ground of the distinction between the two; and it is manifestly a just

52 Barb. (N. Y.) 237; Kerr v. Mount, 28 N. Y. 659; Smith v. Shaw, 12 Johns. (N. Y.) 257; Chapman v. Dyett, 11 Wend. (N. Y.) 31; but the court said that in these cases the processes were either void or had been set aside for irregularity. See, further, Wehle v. Haviland, 69 N. Y. 448; Forrest v. Collier, 20 Ala. 175; Campbell v. Chamberlain, 10 Iowa 337. In Kerr v. Mount, 28 N. Y. 665, Chief-Justice Denio said: "The process being void, the party who set it in motion, and all persons aiding and assisting him, were *prima facie* trespassers." Johnson, J., said: "I incline to the opinion that the attachment was a nullity, on account of the court out of which it was issued having no authority to issue such a process. But I have not examined that question, because, conceding it to have been issued by proper authority in respect to jurisdiction, still, it having been set aside as irregular, it afforded no justification afterwards for acts previously done under it to the party in whose favor it was issued. If issued by competent authority and regular upon its face, it might afford protection to the officer for his acts previously done under it, but none whatever to the party. As to him, it was then as though no process whatever had been issued, and the goods had been taken and detained by his order without any process. Chapman v. Dyett, 11 Wend. (N. Y.) 31; Smith v. Shaw, 12 Johns. (N. Y.) 257; Hayden v. Shed, 11 Mass. 500; Codrington v. Lloyd, 8 Adol. & El. 449; Parsons v. Lloyd, 2 W. Bla. 845. The moment it was set aside the party became a trespasser *ab initio*."

[1] 3 Lans. (N. Y.) 55.

and proper distinction." So in Clark v. Pinney,[1] Chief-Justice Savage said: "Trespass surely would not lie for collecting the amount of a judgment which was merely erroneous."

§ 445. **Void used in the sense of voidable.**—The most common error in the use of the word void is in statutes where it is constantly employed in a connection where the courts interpret it to mean voidable.[2] In Vermont the word void in the statute of 1843, as applied to assignments, was held to mean voidable at the suit of creditors.[3] Conveyances to defraud creditors, though declared by statute absolutely void, are in legal contemplation only voidable.[4] The same construction has been placed upon the word void in the bankrupt act,[5] in leases,[6] in insurance policies,[7] in statutes regulating insolvent assignments,[8] and against usury.[9]

[1] 6 Cow. (N. Y.) 300. See Prentice v. Harrison, 4 Q. B. 852; Miller v. Adams, 52 N. Y. 415. In Palmer v. Foley, 71 N. Y. 109, Folger, J., said: "Where a party in good faith and on a fair presentation of the facts to a court, or to a judicial officer, procures a writ or order of injunction, he is not liable in an action for the damages which the injunction has caused to the person enjoined. Such is the rule as to any process or order in the nature of process thus procured. Daniels v. Fielding, 16 M. & W. 200. Where process sued out by a party is afterwards set aside for error, the party is not liable in an action for damages; where it has been set aside for irregularity, or bad faith in obtaining it, he may be. Williams v. Smith, 14 C. B. (N. S.) 596; s. c. 108 Eng. Com. L. R. 594. See also Miller v. Adams, 52 N. Y. 409; Carl v. Ayers, 53 N. Y. 14."

[2] "What is only voidable is often called void." Larkin v. Saffarans, 15 Fed. Rep. 152. See § 409, n.

[3] Merrill v. Englesby, 28 Vt. 150.

[4] Rappleye v. International Bank, 93 Ill. 396; Lyon v. Robbins, 46 Ill. 279; Kearney v. Vaughan, 50 Mo. 287; Anderson v. Roberts, 18 Johns. (N. Y.) 525; Henriques v. Hone, 2 Edw. Ch. (N. Y.) 120. See Chap. XXVI.

[5] Bromley v. Goodrich, 40 Wis. 140.

[6] Pearsoll v. Chapin, 44 Pa. St. 9; Kearney v. Vaughan, 50 Mo. 284.

[7] Williams v. Albany City Ins. Co., 19 Mich. 451.

[8] Merrill v. Englesby, 28 Vt. 150.

[9] Green v. Kemp, 13 Mass. 515. The Supreme Court of Missouri in Kearney v. Vaughan, 50 Mo. 287, remark: "It is perhaps unfortunate that we are not supplied with a term of more precision than the word 'void,' a word more often used to point out what may be avoided by those interested in doing so, than to indicate an absolute nullity—a proceeding or act to be disregarded on all occasions. Of the latter class we might instance a common-law judgment rendered by a town council, ... or a conveyance by a stranger to the title, while the real owner is in posses-

Again, it is said in Brown v. Brown,[1] that, since the decision in State v. Richmond,[2] the term "void" is seldom, perhaps, unless in a very clear case, to be regarded as implying a complete nullity, but is to be taken in its legal sense, subject to large qualifications in view of all the circumstances calling for its application, and of the rights and interests to be affected in a given case. So in Iowa a statute provision that a sale should be void "if the owner of land sold for taxes establishes fraud in the sale," was construed to mean that it might be avoided.[3] Void, in a policy of insurance, was held to mean suspended till fulfilment of the conditions.[4] So it may be said that in many cases where a transaction is declared void in terms by a rule of the common law, or even expressly by statute, where the obvious intent of the rule or statute is to secure and protect the rights of others, the construction of law is that it is voidable so far that it shall not operate to defeat or impair those rights. A deed of this character is not a dead letter, but can be avoided by the injured person only, and at such time and in such manner as may be necessary to preserve and secure those rights. In other respects, as we have seen, it has its natural effects.[5] It was argued in Denn *ex dem.* Inskeep v. Lecony[6] that void implied an act of no effect at all; a nullity *ab initio.* The court said, however, that this was a mistake, and that when the term was used in refer-

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sion under a record title. But many things are called void which are not *absolutely* so, and, as to mankind generally, are treated as valid. They can only be called *relatively void.* For instance conveyances, assignments, etc., in fraud of creditors, are declared by the statute to be void as to such creditors, and yet they become perfectly good unless attacked by such creditors; and if they shall fail to attack them for the period fixed by the statute of limitations, they become absolutely valid. And so no such deeds are called void in favor of *bona fide* purchasers." See Anderson v. Roberts, 18 Johns. (N. Y.) 515.

[1] 50 N. H. 552.

[2] 26 N. H. 235.

[3] Van Shaack v. Robbins, 36 Iowa 201.

[4] Williams v. Albany City Ins. Co., 19 Mich. 451.

[5] See Wildes v. Vanvoorhis, 15 Gray (Mass.) 139, 143. See Chap. XXVI.

[6] 1 N. J. L. 112.

ence to the solemn judgments and acts of the superior courts, it meant no more than voidable. The judgment or proceeding may be avoided, but, until this is done in the direct and regular course of revision, it stands and is available, and may be justified under as the solemn act of the court. This the court said was reasonable, or it would follow that inferior courts might decide upon the proceedings of the superior courts by declaring them void, and the superior court, by examining such questions incidentally or collaterally, deprive the party of his more formal and orderly redress. When a contract stipulates that on the happening of a certain event it shall be void, the construction put upon it by the courts generally is, that it may on this event be rescinded by the party injured thereby. Thus a proviso, that in case the vendor of an estate cannot deduce a good title, or the purchaser shall not pay the money at the appointed day, the contract shall be void, has been held to mean that the purchaser in the former case, and the vendor in the latter, may avoid the contract, and not that the contract is utterly void.[1] The same rule obtains at law.[2] But when it is sought to avoid a contract if there be a mode of rescission in terms provided it must be rescinded in that way.[3] An assignment, which is void in law as an act of bankruptcy, will not give rise to a forfeiture under a clause of re-entry on the lessee's assigning without the license of the lessor.[4] And a proviso that upon non-payment of rent, etc., the lease shall become utterly void, or similar words, only means that it may be made so by some act of the lessor showing an intention to avoid the lease[5] and the lessee can-

[1] Roberts v. Wyatt, 2 Taunt. 268; Doe *d.* Nash v. Birch, 1 M. & W. 402; Hyde v. Watts, 12 M. & W. 254.

[2] Canfield v. Westcott, 5 Cowen (N. Y.) 270; Mancius v. Sergeant, Ib. 271, note; Church v. Ayers, Ib. 272, note.

[3] McKay v. Carrington, 1 McLean 50.

[4] Doe *d.* Lloyd v. Powell, 5 Barn. & C. 308.

[5] Hartshorne v. Watson, 4 Bing. N. C. 178; Roberts v. Davey, 4 Barn. & Ad. 664; Pennington v. Cardale, 3 H. & N. 656; Bayhs v. Le Gros, 4 C. B. (N. S.) 537.

not elect to make the lease void.[1] In Ewell v. Daggs,[2] Matthews, J., said: "It is quite true that the usury statute referred to declares the contract of loan, so far as the whole interest is concerned, to be 'void and of no effect.' But these words are often used in statutes and legal documents, such as deeds, leases, bonds, mortgages, and others, in the sense of voidable merely, that is, capable of being avoided, and not as meaning that the act or transaction is absolutely a nullity, as if it never had existed, incapable of giving rise to any rights or obligations under any circumstances. Thus we speak of conveyances void as to creditors, meaning that creditors may avoid them, but not others. Leases which contain a forfeiture of lessee's estate for non-payment of rent, or breach of other condition, declare that on the happening of the contingency the demise shall thereupon become null and void, meaning that the forfeiture may be enforced by re-entry, at the option of the lessor. It is sometimes said that a deed obtained by fraud is void, meaning that the party defrauded may, at his election, treat it as void."

§ 446. Terms "become void" and "determined" distinguished.—This distinction is discussed in Sharp v. Curds.[3] In that case the validity of a grant which had been issued after a caveat against the survey had been filed, was in controversy. The statute provided that no grant should issue "until such caveat shall be dismissed, decided, or determined," and that a grant issued contrary to the provisions of the statute should be held and taken as fraudulent. The statute also required the plaintiff in the caveat to deliver a certified copy of it to the clerk of the court in which he intended to prosecute it, within fifteen days after it was filed with the register, and declared that otherwise the caveat should become void. A certified copy of the

[1] Rede v. Farr, 6 M. & S. 121; Doe *d.* Bryan v. Bancks, 4 Barn. & Ald. 401.

[2] 108 U. S. 148.

[3] 4 Bibb. (Ky.) 548.

caveat was not so filed. The court said: "The caveat then having become void, had by operation of law been ended or determined before the grant issued. We do not mean to say that 'to become void' and 'to be determined' are convertible phrases. The former, however, differs from the latter only as a species differs from its genus, and must therefore be included in it; for to say that a thing 'has become void,' necessarily implies that it has in effect been terminated or brought to an end; but the expression applies only to its end or termination in one specific mode, whereas to say that a thing 'has been determined,' though it clearly imports simply that the thing has been terminated or brought to an end, yet the expression is generic in its nature, and comprehends every mode of terminating or bringing a thing to an end."

§ 446*a*. **Void or voidable negotiable instruments.**—Some important principles may be briefly adverted to with regard to the liability of parties to, or purchasers and sellers of, void negotiable instruments or securities or voidable instruments or securities which have been adjudged void. Partially upon the theory that an indorsement is, in addition to the conditional undertaking to pay, an implied warranty of the genuineness of the instrument, it has been held that demand and notice is not necessary to bind the indorser of a note which was absolutely void at its inception.[1] The indorsement is, generally speaking, a separate and independent contract. In Broun v. Hull,[2] Staples, J., said: "As a new and independent contract, it only takes effect from the time it is made, and must be determined by the laws then in force, and the circumstances then existing."[3] The contract of the indorser is so entirely distinct

[1] Chandler v. Mason, 2 Vt. 193; Turnbull v. Bowyer, 40 N. Y. 456; Thrall v. Newell, 19 Vt. 202.

[2] 33 Gratt. (Va.) 30.

[3] See Ingalls v. Lee, 9 Barb. (N. Y.) 647; Cundy v. Marriott, 1 B. & Adol. 696; Billgerry v. Branch, 19 Gratt. (Va.) 418; Evans v. Gee, 11 Pet. 80; Hill v. Lewis, 1 Salk. 132.

and independent from that of the maker that at common law a separate action against each was necessary.[1] As a general rule where a note is void between maker and payee by reason of an illegal consideration, no demand or notice is necessary to hold the indorser; the prevailing rule being that when the principal party is not bound the indorser is liable without demand or notice.[2]

Thus in Copp v. McDugall,[3] in which case a note was adjudged void for usury between maker and payee, and the holder had been defeated in a suit against the maker for that reason, the endorser who had received no notice was held bound. Sewall, J., said: "When the promise or acceptance is void, as it is in a case of usury between the drawer and acceptor, if he will resort to that defense against his promise the contract becomes as it respects the indorser a draft accepted without funds,—that is, in the case of a promissory note." So in New York where the holder of a note transferred it without indorsement and it turned out to be void for usury as between the original parties, Comstock, J., said: "In this case, the defendant held a promissory note which was void because he had himself taken it in violation of the statutes of usury. When he sold the note to the plaintiffs, and received the cash therefor, by that very act he affirmed, in judgment of law, that the instrument was untainted, so far at least as he had been connected with its origin."[4] The same doctrine has been applied to a bond and mortgage adjudged void for usury.[5] So a certificate of deposit though void as between the original parties because constituting a transaction between alien

[1] Patterson v. Todd, 18 Pa. St. 426; Broun v. Hull, 33 Gratt. (Va.) 29.

[2] Perkins v. White, 12 Cent. L. J. 263.

[3] 9 Mass. 1, 6. See Chandler v. Mason, 2 Vt. 193.

[4] Delaware Bank v. Jarvis, 20 N. Y. 229. See Webb v. Odell, 49 N. Y. 583; Fake v. Smith, 7 Abb. Pr. N. S. (N. Y.) 106; Littauer v. Goldman, 9 Hun (N. Y.) 232; overruled in 72 N. Y. 506; Challiss v. McCrum, 22 Kan. 157; Giffert v. West, 33 Wis. 618; Hurd v. Hall, 12 Wis. 112; Costigan v. Hawkins, 22 Wis. 81; Lawton v. Howe, 14 Wis. 241.

[5] Ross v. Terry, 63 N. Y. 613.

enemies may yet bind the assignor.[1] The courts of New York have decided that the indorser of a forged check can be held liable without demand or notice;[2] and it has been said by a distinguished writer,[3] that the doctrine "would extend to any case in which there was no legal principal bound, as where the maker or acceptor was an infant, married woman, or lunatic,[4] or was a fictitious person, the indorser knowing it."[5] The bill or note not being a valid binding obligation the transferrer is held because the instrument is not what it purported or was held out to be. "It is not a question of warranty, but whether the defendant has not delivered something which, though resembling the article contracted to be sold, is of no value."[6]

As gathered from the authorities the recovery against the indorser in this class of cases is founded partly upon the theory of warranty and partly upon the idea of failure of consideration and mistake of fact. Proof of knowledge on the part of the indorser or drawer of the infirmity rendering the note void is regarded in some of the cases as necessary to bind the indorser in the absence of demand or notice.[7] In Littauer v. Goldman,[8] in the New York Court of Appeals, it appeared that the holder of a promissory note tainted with usury had transferred the same to the plaintiff for valuable consideration, but without in-

[1] Morrison v. Lovell, 4 West Va. 350.

[2] Turnbull v. Bowyer, 40 N. Y. 456. See Whitney v. National Bank of Potsdam, 45 N. Y. 305; Bell v. Dagg, 60 N. Y. 530.

[3] Daniel on Negotiable Instruments, § 1113.

[4] See Burrill v. Smith, 7 Pick. (Mass.) 291; 1 Parsons on Notes and Bills, 445.

[5] See Farmers' Bank v. Vanmeter, 4 Rand. (Va.) 553; 1 Parsons N. & B. 460; Lobdell v. Baker, 3 Metc. (Mass.) 472; Thrall v. Newell, 19 Vt. 202; Giffert v. West, 37 Wis. 115; Baldwin v. Van Deusen, 37 N. Y. 487; Hussey v. Sibley, 66 Me. 192.

[6] Young v. Cole, 3 Bing. N. C. 730. See Littauer v. Goldman, 9 Hun (N. Y.) 234; reversed, 72 N. Y. 506; Bell v. Dagg, 60 N. Y. 530; Gompertz v. Bartlett, 2 El. & B. 854; Ross v. Terry, 63 N. Y. 614; Hurd v. Hall, 12 Wis. 112.

[7] Wyman v. Adams, 12 Cush. (Mass.) 210. See 1 Parsons N. & B. 144, note; Leach v. Hewitt, 4 Taunt. 731; Carter v. Flower, 16 M. & W. 747; Farmers' Bank v. Vanmeter, 4 Rand. (Va.) 561.

[8] 72 N. Y. 506.

dorsement or any direct representation as to its inception or legality. The holder had no knowledge of the usury at the time of the transfer, and was in no way a party to it. The court reviewed the authorities, and held that a *scienter* was essential to establish an implied warranty, and that where the article sold was affected with some latent defect of which the vendor was ignorant the doctrine of *caveat emptor* applied. It is beyond the scope of this treatise to follow the criticisms made upon this case. The rule that the indorser warrants the validity of the instrument has been recently considered in the New York Court of Appeals in the case of an accommodation indorser. The court decided that the rule did not apply to an accommodation indorser who received no part of the consideration and was therefore under no legal or moral obligation to refund on the ground of failure of consideration.[1]

§ 446*b*. **Defective public securities.**—This doctrine is not uniformly extended to public securities.[2] In Otis v. Cullum,[3] in which case bonds had been sold which were subsequently adjudged invalid, Mr. Justice Swayne said: "Such securities throng the channels of commerce, which they are made to seek, and where they find their market. They pass from hand to hand like bank notes. The seller is liable *ex delicto* for bad faith; and *ex contractu* there is an implied warranty on his part that they belong to him, and that they are not forgeries. Where there is no express stipulation there is no liability beyond this. If the buyer desires special protection he must take a guaranty. He can dictate its terms, and refuse to buy unless it be given. If not taken he cannot occupy the vantage ground upon which it would have placed him."[4] These cases are distinguished in Rogers v. Walsh,[5] in which latter case the

[1] Susquehanna Valley Bank v. Loomis, 85 N. Y. 207.

[2] Lambert v. Heath, 15 M. & W. 486.

[3] 92 U. S. 449.

[4] See Orleans v. Platt, 99 U. S. 679.

[5] 12 Neb. 28, 30.

vendee was held to be entitled to recover back from the vendor the money paid for what purported to be warrants of York County, but which had been issued by the county commissioners without authority of law and were void. Lake, J., said: "The principle that should govern here was applied in the case of Young v. Cole.[1] . . . . The sale there considered was of certain Guatemala bonds, which because unstamped, had been repudiated by the government of that State, and were therefore valueless, of which facts both seller and purchaser were at the time ignorant, and it was held that the defendant should restore the price he had received. In commenting upon the facts of the case, Tindal, C. J., said that the contract was for real Guatemala bonds, and the question was not one of warranty, but whether the defendant had not delivered something which, though resembling the article contracted to be sold, was of no value."[2]

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[1] 3 Bing. N. C. 724; s. c. 32 Eng. Com. Law, 302.

[2] See generally Thrall v. Newell, 19 Vt. 203; Terry v. Bissell, 26 Conn. 40; Flynn v. Allen, 57 Pa. St. 482; Lobdell v. Baker, 3 Met. (Mass.) 469; Ellis v. Grooms, 1 Stewart (Ala.) 47; Cardin v. Boyd, 11 Heisk. (Tenn.) 176; Howell v. Wilson, 2 Blackf. (Ind.) 419; Turner v. Tuttle, 1 Root (Conn.) 350; Bank of Chillicothe v. Dodge, 8 Barb. (N. Y.) 233; Boyd v. Anderson, 1 Overton (Tenn.) 446; Hurd v. Hall, 12 Wis. 136; City of Plattsmouth v. Fitzgerald, 10 Neb. 401; Ætna Life Ins. Co. v. Middleport, 124 U. S. 545.

CHAPTER II.

VOIDABLE ACTS.

§ 447. Voidable acts.
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§ 447. **Voidable acts.**—We shall devote our limited space more especially to the consideration of the various kinds of voidable acts, the distinctions between the different classes of such acts, and the principles controlling their ratification or avoidance. The field is a wide one, but the discussion will be restricted to suggestions concerning the prominent features of the subject.

§ 447*a*. **Fraudulent contracts and devices.**—"Fraud, as I think," said Blackburn, J., "renders any transaction voidable at the election of the party defrauded; and if, when it is avoided, nothing has occurred to alter the position of affairs, the rights and remedies of the parties are the same as if it had been void from the beginning; but if any alteration has taken place, their rights and remedies are subject to the effect of that alteration."[1] The fraud which renders a sale between parties *sui juris* voidable, except as to an innocent purchaser, may embrace any of the infinite phases of deceit.[2] The fraudulent devices may consist in misrepresentation of pecuniary standing;[3] concealing the pendency of a suit involving more than the value of all the buyer's property;[4] exhibiting false recommendations;[5] giving worthless securities for the price of the goods;[6] payment in fictitious bills,[7] or counterfeit money,[8] or stolen property.[9] Nor is it necessary, in order to avoid the sale, that the false representation should have been of such a character as would have sustained an indictment for false pretences.[10]

§ 447*b*. **Fraud arising from intention not to pay.**—There are of course in addition the familiar cases where the vendee resorted to no badge of fraud and was guilty of no misrep-

[1] The Queen v. Saddlers' Company, 10 H. L. Cas. 420. See Clarke v. Dickson, 1 El. B. & E. 148; Feret v. Hill, 15 C. B. 207.

[2] See 7 Southern L. R. N. S. 562.

[3] Luckey v. Roberts, 25 Conn. 486.

[4] Devoe v. Brandt, 53 N. Y. 462.

[5] Mowrey v. Walsh, 8 Cow. (N. Y.) 238.

[6] Manning v. Albee, 11 Allen (Mass.) 520.

[7] White v. Garden, 10 C. B. 919; Cochran v. Stewart, 21 Minn. 435.

[8] Arnett v. Cloudas, 4 Dana (Ky.) 300; Williams v. Given, 6 Gratt. (Va.) 268; Green v. Humphry, 50 Pa. St. 212.

[9] See Titcomb v. Wood, 38 Me. 563. Compare Lee v. Portwood, 41 Miss. 109; Arendale v. Morgan, 5 Sneed (Tenn.) 703. The fact that the transaction involves criminal false pretences does not affect the title of an innocent purchaser. Cochran v. Stewart, 21 Minn. 435; Williams v. Given, 6 Gratt. (Va.) 268 (reviewing the New York cases). Otherwise by statute in England. See Moyce v. Newington, L. R. 4 Q. B. Div. 32; Lindsay v. Cundy, L. R. 1 Q. B. Div. 357; Keyser v. Harbeck, 3 Duer (N. Y.) 389.

[10] Nichols v. Michael, 23 N. Y. 264.

resentation, but purchased the goods with the preconceived design not to pay for them. Sales of this character where such an intent has been found to exist are voidable.[1] This doctrine is perhaps difficult of application, and the intention is a vague and intangible thing to define and determine, but the principle, nevertheless, has a firm foundation in our law. It is calculated to encourage and enforce candor and fair dealing among men and especially to suppress the tendency of a debtor, having knowledge of his insolvency, to purchase goods upon credit for the express purpose of putting their proceeds into the hands of favored creditors with a view of then suspending payment. A recent illustration of the application of this rule is Donaldson v. Farwell[2] in the United States Supreme Court, where Davis, J., said: "The doctrine is now established by a preponderance of authority, that a party not intending to pay, who, as in this instance, induces the owner to sell him goods on credit by fraudulently concealing his insolvency and his intent not to pay for them, is guilty of a fraud which entitles the

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[1] See Benj. on Sales, § 440, note *e*; Donaldson v. Farwell, 93 U. S. 633. The leading authorities are arranged by States in 7 Southern Law Review N. S. 563. Massachusetts—Rowley v. Bigelow, 12 Pick. 307, 311, 312; Wiggin v. Day, 9 Gray 97; Dow v. Sanborn, 3 Allen 181, 182; Kline v. Baker, 99 Mass. 253, 255. Connecticut—Thompson v. Rose, 16 Conn. 71, 81. Vermont—Redington v. Roberts, 25 Vt. 694, 695. New Hampshire—Stewart v. Emerson, 52 N. H. 301 (leading case). New York—King v. Phillips, 8 Bosw. 603; Ash v. Putnam, 1 Hill 302; Cary v. Hotailing, 1 Hill 311; Bigelow v. Heaton, 6 Hill 43; Mitchell v. Worden, 20 Barb. 253; Buckley v. Artcher, 21 Barb. 585; Barnard v. Campbell, 65 Barb. 286, affirmed 55 N. Y. 456, reaffirmed 58 N. Y. 73; Nichols v. Pinner, 18 N. Y. 295; Hall v. Naylor, 18 N. Y. 588, 589; Nichols v. Michael, 23 N. Y. 264; Hennequin v. Naylor, 24 N. Y. 139; Paddon v. Taylor, 44 N. Y. 371. As to subsequently conceived determination, see Dows v. Rush, 28 Barb. (N. Y.) 157; Mears v. Waples, 3 Houst. (Del.) 581; s. c. 4 Ibid. 62; Powell v. Bradlee, 9 Gill & J. (Md.) 220, 248, 278; Wood v. Yeatman, 15 B. Mon. (Ky.) 271; Bidault v. Wales, 19 Mo. 36; s. c. 20 Mo. 546; Fox v. Webster, 46 Mo. 181; Rice v. Cutler, 17 Wis. 351; Parker v. Byrnes, 1 Lowell 539, 542; Biggs v. Barry, 2 Curtis 262. But compare Smith v. Smith, 21 Pa. St. 367; Backentoss v. Speicher, 31 Pa. St. 324; Wilson v. White, 80 N. C. 280.

[2] 93 U. S. 633.

vendor, if no innocent third party has acquired an interest in them, to disaffirm the contract and recover the goods." The vendor is entitled to rely upon the presence on the part of the vendee of an intention to pay for the goods; the undisclosed non-existence of this intention is regarded as a fraud.

§ 448. **Titles voidable for fraud and for infancy distinguished.**—The law being plainly settled that a fraudulent vendee, whose title is clearly voidable or defeasible at the election of the defrauded vendor, may nevertheless confer upon an innocent purchaser a perfect title,[1] the inquiry is

[1] *Valid title from fraudulent vendee.*—The prevalent loose statement that a fraudulent vendee acquires no title is inaccurate; he acquires a defeasible or voidable title; an intention to transfer the subject-matter of the sale existed; the vendor consented to be divested of his property; a transaction legal in form has been entered into, which it is true can be unraveled, annulled, or defeated at the vendor's election, and the property reclaimed, but until such election or revocation, the vendee may, as a vendor, transfer this defeasible title to a stranger, who, if he purchases for valuable consideration, without notice of the fraud, acquires a complete title. See Somes v. Brewer, 2 Pick. (Mass.) 184, an admirable decision; Rowley v. Bigelow, 12 Pick. (Mass.) 307, per Shaw, C. J.; Moody v. Blake, 117 Mass. 23; Hoffman v. Noble, 6 Met. (Mass.) 68. The doctrine of voidable or defeasible titles has been recognized in many States. Neal v. Williams, 18 Me. 391; Titcomb v. Wood, 38 Me. 563; Willoughby v. Moulton, 47 N. H. 205; Williamson v. Russell, 39 Conn. 406; Mears v. Waples, 3 Houst. (Del.) 581; S. C. 4 Ib. 62; Williams v. Given, 6 Gratt. (Va.) 268; Old Dominion Steamship Co. v. Burckhardt, 31 Ib. 664; Kern v. Thurber, 57 Ga. 172; Lee v. Portwood, 41 Miss. 109; Hawkins v. Davis, 5 Baxter (Tenn.) 698; Wilson v. Fuller, 9 Kan. 176; Sharp v. Jones, 18 Ind. 314; Rice v. Cutler, 17 Wis. 352; Cochran v. Stewart, 21 Minn. 435; Paige v. O'Neal, 12 Cal. 483; Story on Sales, § 200. The logical theory upon which it rests, as regards the superior right of an innocent purchaser, is not clear. In Thurston v. Blanchard, 22 Pick. (Mass.) 18, the *bona fide* purchaser's protection is treated as an arbitrary exception existing in spite of the fact that no title passes to the first vendee; while in George v. Kimball, 24 Pick. (Mass.) 241, it is said that the process by which the vendor is divested of his title is not fully agreed upon. See 7 Southern Law Rev. N. S. 551. The law of New York upon this subject is discussed in many cases. See Caldwell v. Bartlett, 3 Duer (N. Y.) 341; Keyser v. Harbeck, 3 Duer (N. Y.) 373; Stevens v. Hyde, 32 Barb. (N. Y.) 180; Paddon v. Taylor, 44 N. Y. 371. One of the leading and most important of these is Barnard v. Campbell, 65 Barb. (N. Y.) 286; aff'd on appeal, 55 N. Y. 456; reargument denied, 58 N. Y. 73. The substance of the principle recognized in this case is, that the innocent purchaser from the fraudulent vendee has, not a perfect

suggested, why is it, if the conveyance of an infant is only voidable, that an innocent purchaser does not take title from the infant's vendee, free from the infant's right of disaffirmance? There is a wide distinction, however, between the two classes of acts. In the case of a fraudulent transfer the vendor is *sui juris* and capable of performing a valid act. Its voidable character is due to the fact that he is inveigled into its performance by deceit, not that any inherent power to consummate the transaction is wanting. The invalidity rests in extrinsic facts. So, too, an estoppel may operate to seal his lips and prevent a rescission of the act from operating as against an innocent purchaser. The infant's right of disaffirmance, however, is predicated upon entirely different principles. The infant does not possess the judgment or discretion to act or contract; reason is wanting in degree;[1] neither an estoppel, nor the

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title, but an equity superior to that of the original vendor predicated upon an estoppel against the latter's setting up his title after having conferred upon the fraudulent vendee the apparent ownership. Allen, J., said, in the Court of Appeals: "Two things must concur to create an estoppel by which an owner may be deprived of his property by the act of a third person without his assent, under the rule now considered. *First.* The owner must clothe the person assuming to dispose of the property with the apparent title to, or authority to dispose of it; and *Second.* The person alleging the estoppel must have acted and parted with value upon the faith of such apparent ownership or authority, so that he will be the loser if the appearances to which he trusted are not real. In this respect it does not differ from other estoppels *in pais*." Barnard v. Campbell, 55 N. Y. 463, citing Weaver v. Barden, 49 N. Y. 286; McGoldrick v. Willits, 52 N. Y. 612; City Bank v. Rome, W. &. O. R.R. Co., 44 N. Y. 136; Saltus v. Everett, 20 Wend. (N. Y.) 267; Wooster v. Sherwood, 25 N. Y. 278; Brower v. Peabody, 13 N. Y. 121. This New York doctrine has been termed peculiar and exceptional, but it seems to us to embody the only logical and solid basis upon which the title of the innocent purchaser can rest. These principles of course have no application to an assignee in bankruptcy, for he gets no greater interest in, or title to, the property than the bankrupt, he acquires only the defeasible title of the latter to the goods, and his title may be determined by a disaffirmance of the 'contract. The assignee takes subject to all the equities. Donaldson v. Farwell, 93 U. S. 631. See generally Yeatman v. Savings Inst., 95 U. S. 766; Stewart v. Platt, 101 U. S. 739; Chace v. Chapin, 130 Mass. 128; Slade v. Van Vechten, 11 Paige (N. Y.) 21; Clark v. Flint, 22 Pick. (Mass.) 231. See, also, §§ 114, 115.

[1] Dexter v. Hall, 15 Wall. 9.

doctrine of laches can ordinarily operate against him,[1] for he is not *sui juris*; there is an absence of one of the primary elements going to make up a contract. We have said that degrees of void acts are impossibilities;[2] but the instances under consideration prove that there may be, so to speak, degrees of voidable acts. The rescission, or disaffirmance of his deed by an infant is, as we have seen, more fatal and effectual than the disaffirmance of a deed by a vendor for fraud. The voidable characteristics of the infant's deed follow the title, and the right of disaffirmance may be exercised even when it is vested in the hands of an innocent purchaser. It follows that an act voidable for infancy possesses more of the distinguishing characteristics and qualities of a nullity than an act voidable for fraud.

§ 449. **Acts of infants and of lunatics compared.**—Let us examine further the acts of infants and of lunatics. In Breckenridge's Heirs v. Ormsby[3] it is said that a parallel is supposed to exist between the civil acts of lunatics and of infants which is declared to be the well-established doctrine of the law as evidenced by a series of decisions in England and in the various States. Robertson, J., used these words: "It is not necessary to inquire into the reason or fitness of this analogy. Its judicial sanctions give it the irresistible force of unquestionable authority. But if there had been no decision upon it we should be inclined to the opinion that the contracts of lunatics and infants should be identical in their legal effects; and that such acts of an infant as are void should be void if done by a lunatic; and such as are only voidable by plea of infancy, should be but voidable by reason of lunacy."[4] The principles of this case are perhaps too sweeping. A lunatic is clearly more helpless

[1] See Cook v. Toumbs, 36 Miss. 685.

[2] See §§ 413, 419.

[3] 1 J. J. Marsh. (Ky.) 236; s. c. 19 Am. Dec. 72.

[4] See Thompson v. Leach, 1 Ld. Raym. 313; s. c. 3 Mod 308; Highmore on Lunacy, p. 113.

than an infant. An important and prominent case involving a discussion of the distinction between void and voidable acts, is Dexter v. Hall.[1] The question was whether a power of attorney executed by a lunatic was void, or whether it was only voidable. The court below instructed the jury that a lunatic was incapable of executing a contract, deed, power of attorney, or other instrument requiring volition and understanding, and that a power of attorney executed by an insane person was absolutely void. This instruction was affirmed in the United States Supreme Court. The court in the course of a very learned and able opinion, argued that in the light of reason it is difficult to perceive how one incapable of understanding and of acting in the ordinary affairs of life can make an instrument the efficacy of which consists in the fact that it expresses his intention, or more clearly his mental conclusions. "The fundamental idea of a contract is that it requires the assent of two minds. But a lunatic or a person *non compos mentis* has nothing which the law recognizes as a mind, and it would seem therefore, upon principle, that he cannot make a contract which may have any efficacy as such. He is not amenable to the criminal laws because he is incapable of discriminating between that which is right and that which is wrong. The government does not hold him responsible for acts injurious to itself. Why then should one who has obtained from him that which purports to be a contract be permitted to hold him bound by its provisions, even until he may choose to avoid it? If this may be, efficacy is given to a form to which there has been no mental assent. A contract is made without any agreement of minds. And as it plainly requires the possession and exercise of reason quite as much to avoid a contract as to make it, the con-

[1] 15 Wall. 9. Compare Edwards v. Davenport, 20 Fed. Rep. 756; Parkhurst v. Hosford, 21 Fed. Rep. 832; Anglo-Californian Bank v. Ames, 27 Fed. Rep. 728.

tract of a person without mind has the same effect as it would have had he been in full possession of ordinary understanding. While he continues insane he cannot avoid it; and if, therefore, it is operative until avoided, the law affords a lunatic no protection against himself. Yet a lunatic, equally with an infant, is confessedly under the protection of courts of law as well as courts of equity. The contracts of the latter, it is true, are generally held to be only voidable (his power of attorney being an exception). Unlike a lunatic, he is not destitute of reason. He has mind, but it is immature, insufficient to justify his assuming a binding obligation. And he may deny or avoid his contract at any time . . . . after he comes of age. This is for him a sufficient protection. But as a lunatic cannot avoid a contract for want of mental capacity, he has no protection if his contract is only voidable."

§ 450. **Tests of infants' acts.**—There has been a marked change in our law with regard to the subject of the legal effect of an infant's acts, whether they are to be considered void or voidable; and numerous attempts, generally unsuccessful, have been made to formulate a test applicable to all cases. An English writer many years ago[1] concluded that the true criterion was, that "acts which are capable of being legally ratified are voidable only; acts which are incapable of being legally ratified are absolutely void." This test, however, is palpably worthless, and renders the confusion worse confounded. The principle it embodies is correct, but the effect of the rule is to "replace one difficulty by another." The inquirer is brought no nearer a solution of the problem. Chancellor Kent repudiated this criterion, and remarked that it did not free the question from embarrassment, or afford a clear and definite test.[2] The rule furnished by Chief-Justice Eyre[3] is, that where the courts can

[1] Bingham on Infancy, p. 45.
[2] 2 Kent's Com. 234.
[3] Keane v. Boycott, 2 H. Bla. 512.

pronounce that the contract is for the benefit of the infant, as for instance for necessaries, then it shall bind him; where it can pronounce it to be to his prejudice it is void; and where it is of an uncertain nature as to benefit or prejudice it is voidable only, and it is in the election of the infant to affirm or disaffirm it. This test seems deservedly to have met with more favor[1] than the one last furnished, for it embodies the characteristics of the acts which are void or voidable, and is probably as definite as any of which the subject is capable.[2]

§ 451. **Classes of infants' acts.**—The character of the acts and contracts of infants is discussed with much clearness in Robinson v. Weeks,[3] and the court in conclusion use these words: "We think the true doctrine is that the contracts of minors may be divided into three classes. First. Binding; if for necessaries at fair and just rates. Second. Void; if manifestly and necessarily prejudicial, as of suretyship, gift, naked release, appointment of agents, confession of judgment, or the like. Third. Voidable, at the election of the minor, either during his minority or within a reasonable time after he becomes of age; and this last class includes all the agreements of a minor which may be beneficial and are not for necessaries until fully executed on both sides, and all executed contracts of this sort where the other party can be placed substantially in *statu quo*." As stated by the Supreme Court of Alabama, in Philpot v. Bingham,[4] "Contracts of an infant, caused by his necessities, or manifestly for his advantage, are valid and binding, while those manifestly to his hurt are void. Contracts falling between these classes are voidable. Relaxation of ancient rigor has

[1] United States v. Bainbridge, 1 Mason 82; 2 Kent's Com. 236; McGan v. Marshall, 7 Humph. (Tenn.) 121.

[2] In Dunton v. Brown, 31 Mich. 182, Campbell, J., said: "It is only such agreements as are not possibly to be regarded as beneficial to him [the infant] which are null from the beginning."

[3] 56 Me. 106.

[4] 55 Ala. 438.

had the effect of placing many transactions, formerly adjudged void, in the more conservative category of voidable."

§ 452. **Contracts of infants usually voidable—Illustrations.**—The right of an infant to own real and personal property is as clearly defined and as well protected as that of an adult.[1] The infant acquires the absolute title, and his parent, guardian, or master has in law no more right to take the property for any purpose beyond that of safe keeping, than a stranger.[2] Keeping this fact in view, let us consider further the infant's power to make contracts. Very few acts or contracts of infants are absolutely void, and these are limited to such as necessarily operate to his prejudice. It has been said that it is fortunate for infants that such is the law, for deplorable indeed would be their condition if, during the period of minority which is arbitrarily fixed by law, they could make no contracts for their own benefit. Their legal disability would then become a "handcuff instead of a shield," and the law would be their worst enemy instead of being, as it professes to be, their guardian and best friend. If their contracts are void, then the infant is not bound, and no duty or obligation is imposed upon those with whom the void contract purported to have been made; infants would thus be doomed to vassalage and frequently to destitution and oppression. In the leading case of Breckenridge's Heirs v. Ormsby,[3] Robertson, J., said: "The enlightened benevolence of the common law, therefore, enables infants to make valid contracts with adults, and to secure their inexperience and imbecility from imposition, allows the infants, but not the other parties, the personal privilege of avoiding them, if they shall consider them disadvantageous. This is exactly as it should be. There are very few contracts from which the adult party can escape, under

[1] McCloskey v. Cyphert, 27 Pa. St. 220.

[2] See Boobier v. Boobier, 39 Me. 406; Smith v. Smith, 3 Bing. N. C. 29; McCloskey v. Cyphert, 27 Pa. St. 220.

[3] 1 J. J. Mar. (Ky.) 236; s. c. 19 Am. Dec. 71, 74.

cover of the disability of the minor party." The benefit to accrue to the infant is the great point to be regarded, the purpose of the law being to protect his estate from injury resulting from his indiscretion, imbecility, or imprudence. This general rule seems to require that all contracts of infants should be held voidable rather than void. Hence it is that, if the act has a semblance of benefit to the infant it is considered voidable. A contrary policy would prejudice the infant and in a measure benefit the third party who might deal with him, which is exactly contrary to the spirit of the rule. Chief-Justice Parker said: "Whenever the act done *may be* for the benefit of the infant, it shall not be considered void; but he shall have his election when he comes of age to affirm or avoid it."[1] An infant may make a voidable purchase of land, for, said Coke, "it is intended for his benefit, and at his full age he may either agree thereunto and perfect it, or, without any cause to be alleged, waive or disagree to the purchase,"[2] and sales of real estate by infants are not void but voidable.[3] So an exchange of real estate by an infant is voidable.[4] A minor's contract for stock,[5] his agreement to convey,[6] his contract to deliver

[1] Whitney v. Dutch, 14 Mass. 462. See 2 Kent's Com. 234. In Smith v. Mayo, 9 Mass. 64, Parker, J., said: "The general policy of the principle of law which authorizes an infant to avoid a contract cannot be disputed. The experience of ages has proved its utility. The readiness of young persons to engage themselves in burdensome contracts without sufficient consideration, and of older ones to take advantage of their inexperience, would produce general mischief in the community, did not this wholesome principle interpose to produce a degree of caution in looking to the character of those with whom they deal; and although particular instances of hardship may be lamented, the general policy of the law must be enforced."

[2] Co. Litt. 2 b.

[3] Ferguson v. Bell, 17 Mo. 351; Gillet v. Stanley, 1 Hill (N. Y.) 121; Wheaton v. East, 5 Yerg. (Tenn.) 41; Allen v. Poole, 54 Miss. 323; Illinois Land Co. v. Bonner, 75 Ill. 315; Dixon v. Merritt, 21 Minn. 196; Davis v. Dudley, 70 Me. 236; Schaffer v. Lavretta, 57 Ala. 14; Bool v. Mix, 17 Wend. (N. Y.) 119; Scranton v. Stewart, 52 Ind. 68; Youse v. Norcoms, 12 Mo. 549; Barker v. Wilson, 4 Heisk. (Tenn.) 268.

[4] Williams v. Brown, 34 Me. 594.

[5] Indianapolis Chair Mfg. Co. v. Wilcox, 59 Ind. 429; Ruchizky v. De Haven, 97 Pa. St. 202.

[6] Carrell v. Potter, 23 Mich. 377.

money[1] or pay borrowed money,[2] his chattel mortgage,[3] his partnership agreement,[4] his gifts,[5] his deed of trust,[6] and his contracts generally,[7] may be instanced as acts or transactions which are voidable.

§ 453. **Judgments against infants.**—Infants are deemed to be wards of the court, and, when brought in by service of process, the court will look after and protect their interests.[8] The failure to appoint a guardian for an infant is held in many cases to render the judgment voidable, but not absolutely void,[9] and in general judgments against him are voidable.[10] Thus, a judgment in partition may be avoided as against minors who were not represented in the suit by a guardian *ad litem*, but the judgment cannot be impeached in a collateral action.[11] And, as a general rule, a judgment against an infant, rendered without the appointment of a guardian *ad litem*, is not void, but valid until reversed or set aside.[12]

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[1] West v. Penny, 16 Ala. 186.

[2] Kennedy v. Doyle, 10 Allen (Mass.) 161.

[3] Miller v. Smith, 26 Minn. 248; Corey v. Burton, 32 Mich. 30.

[4] Dunton v. Brown, 31 Mich. 182; Jaques v. Sax, 39 Iowa 367.

[5] Oxley v. Tryon, 25 Iowa 95; Person v. Chase, 37 Vt. 647; Holt v. Holt, 59 Me. 464.

[6] Slaughter v. Cunningham, 24 Ala. 260.

[7] Hill v. Anderson, 13 Miss. 216; Robinson v. Weeks, 56 Me. 102.

[8] Ingersoll v. Mangam, 84 N. Y. 622.

[9] Matter of Becker, 28 Hun (N. Y.) 211; McMurray v. McMurray, 66 N. Y. 177; Croghan v. Livingston, 17 N. Y. 218; Bloom v. Burdick, 1 Hill (N. Y.) 143; See Ingersoll v. Mangam, 84 N. Y. 622; Preston v. Dunn, 25 Ala. 507; Robb v. Lessee of Irwin, 15 Ohio 689; Gronfier v. Puymirol, 19 Cal. 629; Barber v. Graves, 18 Vt. 290; Austin v. Charlestown Seminary, 8 Met. (Mass.) 196; White v. Albertson, 3 Dev. Law (N. C.) 241.

[10] Kemp v. Cook, 18 Md. 130; Trapnall v. State Bank, 18 Ark. 53; Bickel v. Erskine, 43 Iowa 213; Walkenhorst v. Lewis, 24 Kan. 420.

[11] Montgomery v. Carlton, 56 Texas 365.

[12] Simmons v. McKay, 5 Bush (Ky.) 25; Pond v. Doneghy, 18 B. Mon. (Ky.) 558; Smith v. Ferguson, 3 Met. (Ky.) 424.

Judgments against married women.—So at common law a personal judgment cannot be entered against a *feme covert* by confession. Such judgments have invariably been set aside on motion. See 2 Graham's Pr., 2d ed., 772; Brittin v. Wilder, 6 Hill (N. Y.) 242; Oulds v. Sansom, 3 Taunt. 261. It was said by Mason, J., in Watkins v. Abrahams, 24 N. Y. 74, in delivering the opinion of the New York Court of Ap-

§ 454. **Infant's power of attorney.**—In discussing the distinction between the void and voidable acts of an infant, his power of attorney under seal is generally selected by way of example as an act absolutely void.[1] Thus, it is said by the Supreme Court of the United States in Dexter v. Hall (1872):[2] "We know of no case of authority in which the letter of attorney of either an infant or a lunatic has been held merely voidable." In Semple v. Morrison[3] it was decided that an infant's appointment of an attorney or agent by parol was equally void with one made under seal. So in Knox v. Flack[4] the court declared that a minor's warrant of attorney to confess judgment, no matter under what circumstances it was given, was clearly void. And in Philpot v. Bingham[5] (decided in 1876), the cases were followed to the effect that an infant's power of attorney to sell lands was absolutely void.[6] The principles of these cases, however, are in conflict with the spirit and tendency of our modern law, which is to regard all the acts, contracts, and transactions of minors as merely voidable, "because it is better for infants that they should have an election." It

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peals, that a married woman could "no more confess a valid judgment *in personam* than an infant. She was always placed on the same footing in this respect as an infant." But see Knickerbacker v. Smith, 16 Abb. Pr. (N. Y.) 243. This disability is now in great measure removed by statute.

[1] See Whitney v. Dutch, 14 Mass. 457; s. c. 7 Am. Dec. 229; Dexter v. Hall, 15 Wall. 9; Waples v. Hastings, 3 Harr. (Del.) 403; Lawrence v. McArter, 10 Ohio 37; Bennett v. Davis, 6 Cow. (N. Y.) 393; Pyle v. Cravens, 4 Litt. (Ky.) 17; Trueblood v. Trueblood, 8 Ind. 195; Knox v. Flack, 22 Pa. St. 337; Thompson v. Leach, 3 Mod. 302; Zouch v. Parsons, 3 Burr. 1805; Saunderson v. Marr, 1 H. Bla. 75; Cole v. Cole, 9 Lancaster Bar 105; s. c. 7 Luz. Leg. Reg. 38; Fonda v. Van Horne, 15 Wend. (N. Y.) 636. This distinction may be traced to the early doctrine that the deeds of an infant which do not take effect by delivery of his bond are void, and such as do take effect by delivery of his bond are voidable. See Conroe v. Birdsall, 1 Johns. Cas. (N. Y.) 127; Zouch v. Parsons, 3 Burr. 1804; Ashlin v. Langton, 4 Moore & S. 719.

[2] 15 Wall. 26.

[3] 7 Mon. (Ky.) 298. But see Hardy v. Waters, 38 Me. 450.

[4] 22 Pa. St. 337.

[5] 55 Ala. 435.

[6] But compare Armitage v. Widoe, 36 Mich. 124; Weaver v. Carpenter, 42 Iowa 347.

does not necessarily result that the appointment of the agent or attorney will work an injury or disadvantage to the infant. On the contrary, if it is made to enable the attorney to do some act for the benefit of the infant, such as a power of attorney to receive seizin to complete his title to an estate, it should clearly be upheld.[1] If the appointment, as these decisions seem to imply, is absolutely void, then no person is bound by any act of the agent; it is a nullity, incapable of confirmation or ratification, no matter how great an advantage might have resulted to the infant from the agent's diligence and skill.[2] In a case which arose in Massachusetts, it was held that a paper not under seal, signed by an infant, authorizing the attorney to receive the money to his own use, was not void;[3] so an infant's power of attorney to sell[4] or transfer[5] a promissory note has been held not to be void. The Supreme Court of Maine, in Towle v. Dresser,[6] decided that the rescission of a minor's contract, through the intervention of an agent employed by him for that purpose, was not manifestly nor necessarily prejudicial to the minor, and was not to be classed as void; that where, as in that case, it was accompanied by the restoration of the consideration, it would be regarded as so far effectual that the other party could no longer shield himself under the contract from a liability to restore or make compensation for such of the infant's property as he acquired by the contract.

§ 455. **Other examples of void acts.**—Other illustrations of acts of infants held to be void, are his promissory note as surety,[7] his bond as surety,[8] or with penalty for the pay-

[1] See Whitney v. Dutch, 14 Mass. 457.

[2] See Pickler v. The State, 18 Ind. 269; Story on Agency, pp. 463, 474, 477.

[3] McCarty v. Murray, 3 Gray (Mass.) 578. Compare Kingman v. Perkins, 105 Mass. 111.

[4] Hastings v. Dollarhide, 24 Cal. 195.

[5] Hardy v. Waters, 38 Me. 450.

[6] 73 Me. 258.

[7] Curtin v. Patten, 11 S. & R. (Pa.) 305; Nightingale v. Withington, 15 Mass. 272; Maples v. Wightman, 4 Conn. 376.

[8] Allen v. Minor, 2 Call (Va.) 70; Carnahan v. Allderdice, 4 Harr. (Del.) 99.

ment of interest.[1] Then an infant's conveyance of land by way of gift or without consideration has been held to be void, because obviously prejudicial to his interests.[2] But the tendency of the modern cases certainly is to enlarge the class of voidable acts.[3] An example of this may be found in the cases adjudging an infant's contract as surety or indorser, voidable and not void.[4]

§ 456. **Infant's voluntary assignment.**—An infant's assignment in trust for the benefit of creditors was adjudged, in Yates v. Lyon,[5] to be absolutely void upon the theory that an assignment must be unconditional, and reserve no right of disaffirmance or revocation to the assignor; that it was difficult to see how an infant could of his own act and volition create a trust and appoint a trustee to administer it;[6] and that as the assignment did not and could not absolutely and unconditionally devote the property assigned to the payment of the debts of the assignor, it was void in law as against creditors. Johnson, J., said: "The general principle that a sale or assignment by an infant is voidable only, and not void until he elects to avoid it, and remains valid until such election, does not apply to this branch of the law which allows property to be withdrawn from

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[1] Baylis v. Dineley, 3 M. & S. 477; Fisher v. Mowbray, 8 East 330.

[2] Swafford v. Ferguson, 3 Lea (Tenn.) 294. But see Slaughter v. Cunningham, 24 Ala. 260.

[3] See *e. g.* State v. Plaisted, 43 N. H. 413; Palmer v. Miller, 25 Barb. (N. Y.) 399; Mustard v. Wohlford, 15 Gratt. (Va.) 329.

[4] Hardy v. Waters, 38 Me. 450; Harner v. Dipple, 31 Ohio St. 72; Owen v. Long, 112 Mass. 403; Williams v. Harrison, 11 S. C. 412; Fetrow v. Wiseman, 40 Ind. 148. In Owen v. Long, 112 Mass. 404, Gray, C. J., said: "It cannot be held as matter of law that to sign a promissory note as surety is necessarily not beneficial to an infant. It may or may not be beneficial to him, according to the actual circumstances of the transaction."

[5] 61 Barb. (N. Y.) 205. See Fox v. Heath, 21 How. Pr. (N. Y.) 384.

[6] But see *contra*, Hearle v. Greenbank, 1 Ves. Sr. 304; 2 Kent's Comm. 234; Eagle Fire Co. v. Lent, 1 Edw. Ch. (N. Y.) 301; S. C. 6 Paige (N. Y.) 635. "An infant may make over property upon trust by any act of assurance, and it is not void but voidable only; and the estate of the trustee will remain good until the assurance be avoided." Yates v. Lyon, 61 N. Y. 347.

ordinary legal process in a certain way, and upon certain terms only. Nor is it of the least consequence that the infant assignor did not elect to disaffirm or revoke, but, by his silence afterwards, consented and ratified. The vice lies in the power he had, by law, to disaffirm and avoid. The assignment did not, when executed and delivered, operate to devote the property unqualifiedly, and consequently did not withdraw it from the reach of legal process." This decision of an intermediate tribunal was, however, overturned in the New York Court of Appeals.[1] The opinion of the latter court illustrates the prevalent tendency to further restrict the class of infants' void acts. It was said that in any case, if the defense of infancy was to be made it must be distinctly interposed by the infant himself, and that it was not the proper function of the court to make it for him. Furthermore, it was held that the assets of the firm were liable for the debts of the concern, and that the utmost exemption the infant could claim was personal exemption from debts beyond what the assets of the firm were able to pay, and this exemption must be claimed by the infant himself.

§ 457. **Liability for torts.**—An infant is liable in an action *ex delicto* for an injury to property occasioned by a wrongful act, such as exploding fire-crackers in the public streets of a city, thereby frightening a horse which fell down and died.[2] In Eckstein v. Frank,[3] where it appeared that an infant had fraudulently represented that he was of full age, he was held liable in an action of tort brought to recover back the property or for damages. So in Wallace v. Morss,[4] an infant was held liable for obtaining goods fraudulently without intending to pay for them.

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[1] Yates v. Lyon, 61 N. Y. 347.

[2] Conklin v. Thompson, 29 Barb. (N. Y.) 218. See Bullock v. Babcock, 3 Wend. (N. Y.) 391.

[3] 1 Daly (N. Y.) 334.

[4] 5 Hill (N. Y.) 391. But see Root v. Stevenson, 24 Ind. 115.

So he may be held liable for embezzlement,[1] or for drawing a check against a bank where he has no funds, in payment for a purchase.[2]

§ 458. **Infant's fraud will not establish contract liability.** —Studwell v. Shapter[3] was an action founded on contract for the value of goods sold and delivered to an infant. The complaint also contained allegations to the effect that the infant had been guilty of deceit in effecting the purchases. The court decided that the allegations of deceit, when given their full effect, were entirely insufficient to charge the infant with a *legal liability* on the *contracts* which the plaintiffs were, by reason of the deceit, induced to enter into with the infant. The point of this case is that misrepresentations and deceit cannot be made the basis upon which to enforce the agreements or contracts of purchase; the remedy, if any, is an action to recover damages resulting from the deceit. Kent says: "The fraudulent act, to charge him, must be wholly tortious, and a matter arising *ex contractu*, though infected with fraud, cannot be changed into a tort in order to charge the infant in trover, or case, by a change in the form of the action."[4] There must be a tort independent of the contract.[5] Thus, in People v. Kendall,[6] Nelson, J., said (*obiter*): "It is well settled that a matter arising *ex contractu*, though infected with fraud, cannot be changed into a tort in order to charge the infant by a change of the remedy." At least, if the wrong in any way arises out of contract, the infant cannot be held unless the contract is disaffirmed by

[1] Elwell v. Martin, 32 Vt. 217.

[2] Mathews v. Cowan, 59 Ill. 341.

[3] 54 N. Y. 249.

[4] 2 Kent's Comm. 241, citing Jennings v. Rundall, 8 T. R. 335; Johnson v. Pie, 1 Lev. 169; Vasse v. Smith, 6 Cranch 226; West v. Moore, 14 Vt. 447; Wilt v. Welsh, 6 Watts (Pa.) 9.

[5] Hewitt v. Warren, 10 Hun (N. Y.) 563; Moore v. Eastman, 1 Hun (N. Y.) 578; Green v. Greenbank, 2 Marshall 485; S. C. 4 Eng. C. L. R. 375; People v. Kendall, 25 Wend. (N. Y.) 399; Munger v. Hess, 28 Barb. (N. Y.) 75; Prescott v. Norris, 32 N. H. 101; Morrill v. Aden, 19 Vt. 505.

[6] 25 Wend. (N. Y.) 401.

the aggrieved party. In Hewitt v. Warren,[1] Learned, J., said: "If an infant, by fraud, obtains property, with no intention of paying, though it be under the pretence of a contract of purchase, the defrauded party may recover. He does so on the ground that there was no real contract, and he disaffirms the apparent contract. On the same ground those cases must stand which have permitted a recovery for damages when an infant, to obtain goods, has fraudulently pretended that he was of full age. On the same principle, if a party has been induced to purchase property from an infant, by the infant's fraud and misrepresentation, it would seem that he might, on discovering the fraud, disaffirm the contract, return, or offer to return the property, and thus put the infant in the position of a mere wrong-doer, unjustly keeping what he had fraudulently obtained. And it would seem that the infant would then be liable in damages for tort." The weight of authority seems also to be to the effect that the infant is not estopped from interposing that plea, though he fraudulently represented himself as of age when he contracted the obligation.[2]

§ 459. **Acts binding upon infants.**—"Under the denomination *necessaries* fall not only the food, clothes, and lodging necessary to the actual support of life, but likewise means of education suitable to the infant's degree, and all those accommodations, conveniences, and even matters of taste, which the usages of society for the time being render proper and conformable to a person in the rank in which the infant moves."[3] This class of contracts, being valid and effectual, are without the scope of this treatise, but we may

[1] 10 Hun (N. Y.) 564.

[2] Conrad v. Lane, 26 Minn. 389; s. c. 37 Am. Rep. 412; Merriam v. Cunningham, 11 Cush. (Mass.) 40; Burley v. Russell, 10 N. H. 184; Gilson v. Spear, 38 Vt. 311; Studwell v. Shapter, 54 N. Y. 249; Heath v. Mahoney, 7 Hun (N. Y.) 100; Carpenter v. Carpenter, 45 Ind. 142. See Hughes v. Gallans, 10 Phila. (Pa.) 618.

[3] Smith on Contracts, p. 283.

observe that the term "necessaries" "is a flexible and not an absolute term,"[1] and that ordinarily the infant is not liable for necessaries when he is living with his parents or guardian, and his needs are supplied by them,[2] but only when he is away from home.[3] The question as to what constitutes necessaries is generally left to the jury under general instructions, and as the surroundings and circumstances of the infants vary in each case, it is quite impossible to formulate any precise or entirely satisfactory conclusion from the authorities. The tastes and prejudices of different juries, and the wide divergence in the needs, social position, and pecuniary prospects of infants necessarily introduce an element of great uncertainty into the consideration of the subject. While the infant is liable for necessaries, he is not bound by an agreement to pay a particular sum;[4] the contract is voidable beyond the fair price or value of the goods.[5] Hence it has been held in Arkansas that an infant's bond for necessaries is valid, and that in an action upon it, if the defense of infancy was pleaded, the plaintiff might recover the value of the necessaries.[6] A bill for the board of horses occasionally used to carry the infant's family out to ride, has been held not to come within the class of necessaries,[7] and an infant has been held not to be liable for medical services simply because his parents were poor,[8] nor in certain cases are kid gloves, cologne, silk cravats, and walking-canes necessaries;[9] nor a bill for confectionery, fruit, and dinners of an undergraduate at college supplied in his room, where he entertained friends.[10]

[1] Breed v. Judd, 1 Gray (Mass.) 458.

[2] See Angel v. McLellan, 16 Mass. 28; Connoly *ads.* Hull, 3 McCord's (S. C.) Law 6; Perrin v. Wilson, 10 Mo. 451; Tilton v. Russell, 11 Ala. 497; Nichol v. Steger, 6 Lea (Tenn.) 393.

[3] Angel v. McLellan, 16 Mass. 28.

[4] Parsons v. Keys, 43 Texas 557.

[5] Baum v. Stone, 12 Weekly Dig. (N. Y.) 353.

[6] Guthrie v. Morris, 22 Ark. 411. See Cooper v. The State, 37 Ark. 425.

[7] Merriam v. Cunningham, 11 Cush. (Mass.) 40.

[8] Hoyt v. Casey, 114 Mass. 397.

[9] Lefils v. Sugg, 15 Ark. 137.

[10] Wharton v. Mackenzie, 5 Q. B. 606. See Brooker v. Scott, 11 M. & W. 67.

Tobacco,[1] betting books,[2] an insurance contract,[3] solitaires,[4] money paid for exemption from military duty,[5] and expenses of improvements upon a minor's lands,[6] have, in each instance, been rejected as not being necessaries.

An infant has been held liable for board,[7] for schooling,[8] though not always for a college education,[9] for wedding clothes,[10] for presents to his bride,[11] for a yoke of oxen used upon a farm which was managed by the minor,[12] for the services of an attorney in defending him in a bastardy case,[13] preparing a marriage settlement,[14] or in other legal business,[15] for a dentist bill,[16] and for necessaries furnished to his wife.[17]

§ 460. **Contracts of lunatics.**—"It is evident," says Chief-Justice Redfield, in Lincoln v. Buckmaster,[18] "from a careful examination of the decided cases, that the law is not fully settled as to the extent of the liability of lunatics arising out of contracts." So in Eaton v. Eaton[19] the court remarked that "an examination of the cases upon this subject shows much conflict and some uncertainty."[20] Though the law governing this subject in all its phases cannot be definitely and satisfactorily declared, yet certain of the rules applicable to it can be formulated, and the tendency of the

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[1] Bryant v. Richardson, L. R. 3 Ex. 93, n.

[2] Jenner v. Walker, 19 Law Times (N. S.) 398.

[3] New Hampshire Ins. Co. v. Noyes, 32 N. H. 345.

[4] Ryder v. Wombwell, L. R. 4 Exch. 32.

[5] Dorrell v. Hastings, 28 Ind. 478.

[6] Price v. Sanders, 60 Ind. 314; Tupper v. Cadwell, 12 Met. (Mass.) 559; Wallis v. Bardwell, 126 Mass. 366.

[7] Bradley v. Pratt, 23 Vt. 378.

[8] Raymond v. Loyl, 10 Barb. (N. Y.) 489; Manby v. Scott, 1 Sid. 112.

[9] Middlebury College v. Chandler, 16 Vt. 683.

[10] Sams v. Stockton, 14 B. Mon. (Ky.) 232.

[11] Jenner v. Walker, 19 Law Times (N. S.) 398.

[12] Mohney v. Evans, 51 Pa. St. 80.

[13] Barker v. Hibbard, 54 N. H. 539. But see Phelps v. Worcester, 11 N. H. 51.

[14] Helps v. Clayton, 17 C. B. (N. S.) 553.

[15] Munson v. Washband, 31 Conn. 303.

[16] Strong v. Foote, 42 Conn. 203.

[17] Price v. Sanders, 60 Ind. 315, and cases cited.

[18] 32 Vt. 659.

[19] 37 N. J. Law 115.

[20] See Jackson v. King, 4 Cowen (N. Y.) 207; s. c. 15 Am. Dec. 354, and note.

authorities outlined. The early common-law principle to the effect that a person of mature years could not be heard to stultify himself by pleading his own mental incapacity in avoidance of his contracts,[1] has been exploded.[2] Where it is sought to avoid an act on the ground of mental disability, the burden of proof of the fact lies upon the party who alleges it, and, until the contrary appears, sanity is to be presumed.[3] One of the qualifications of this rule is that after a general derangement has been shown, it is then incumbent on the other side to show that the party who did the act was sane at the very time when it was performed.[4] With reference to the contracts of lunatics, prior to inquisition, it may be stated as a general rule that if there was no fraud practiced or undue advantage taken, and no knowledge of the infirmity, the contract, especially if executed, will be upheld. Knowledge of insanity will be imputed from circumstances which would put a reasonable and prudent man upon inquiry.[5] In Yauger v. Skinner[6] the court held that if the proof was clear that an executory contract to purchase had been made in good faith, and for a full and fair price, and the lunacy of the vendor was neither known nor suspected, and the contract was afterward executed on the part of the purchaser without knowledge or belief of the existence of the incapacity of the grantor, it would be upheld. Lord Cranworth[7] says, as the result of the authorities: "Dealings of sale and purchase by a person apparently sane, though subsequently

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[1] Beverley's Case, 4 Rep. 123b; Stroud v. Marshall, Cro. Eliz. 398; Cross v. Andrews, Cro. Eliz. 622; Anon. 13 Ves. 590; Brown v. Jodrell, 3 C. & P. 30.

[2] Grant v. Thompson, 4 Conn. 203; Mitchell v. Kingman, 5 Pick. (Mass.) 431; Rice v. Peet, 15 Johns. (N. Y.) 503; Lang v. Whidden, 2 N. H. 435; Bensell v. Chancellor, 5 Whart. (Pa.) 378; Gore v. Gibson, 13 M. & W. 623; Webster v. Woodford, 3 Day (Conn.) 90.

[3] Jackson v. King, 4 Cowen (N. Y.) 207.

[4] Jackson v. Van Dusen, 5 Johns. (N. Y.) 159; s. c. 4 Am. Dec. 330.

[5] Lincoln v. Buckmaster, 32 Vt. 652.

[6] 14 N. J. Eq. 389.

[7] Elliot v. Ince, 7 De G., M. & G. 475, 488.

found to be insane, will not be set aside against those who have dealt with him on the faith of his being a person of competent understanding." Vice-Chancellor Shadwell has said: "I do not understand it to be denied that if the party treating with the lunatic knew of the lunacy, that is a fraud."[1] In Molton v. Camroux[2] the court say: "The rule as laid down by Littleton and Coke, has, no doubt, in modern times been relaxed, and unsoundness of mind would now be a good defense . . . . if it could be shown that the defendant was not of capacity to contract, and the plaintiff knew it." Weakness of understanding is not of itself any objection in law to the validity of a contract. If a man is legally *compos mentis*, he is the disposer of his own property, and his will is the reason for his actions.[3] The promissory note of a lunatic given for valuable consideration is valid, but the want of consideration may be shown, even against a *bona fide* holder for value.[4] Especially where the insane man gets the benefit of the contract, it will not be set aside in equity,[5] and where one party is a monomaniac, a conveyance which has no connection with his morbid condition may be sustained.[6]

§ 461. **What incapacity must be shown.**—If a party possesses the requisite mental faculties to transact rationally the ordinary affairs of life, he will not be relieved from the responsibility of the ordinary citizen.[7] To constitute such intellectual incapacity to transact business as will relieve a party from responsibility on his contracts, "there must be that degree of mental derangement, or state of imbecility of mind, that induces the belief that the party is incapable of fully comprehending the effect and consequences of his

[1] Price v. Berrington, 7 Hare 402.
[2] 2 Exch. 501.
[3] See Osmond v. Fitzroy, 3 P. Wms. 129.
[4] Moore v. Hershey, 90 Pa. St. 196. See Wirebach v. First Nat. Bank, 97 Pa. St. 543.
[5] Kneedler's Appeal, 92 Pa. St. 428.
[6] Ekin v. McCracken, 11 Phila. (Pa.) 534.
[7] See Titcomb v. Vantyle, 84 Ill. 371.

acts, or, at least, that he is so weak as to be almost a mere instrument in the hands of the person seeking to obtain the advantage. On the contrary, if a person is capable of reasoning correctly on the ordinary affairs of life; or is capable of contemplating and understanding the consequences which usually accompany ordinary acts, he will be held *compos mentis* and be bound by his acts."[1] The doctrine that there must be a total deprivation of reason to vitiate a contract, was questioned in the great case of Delafield v. Parish.[2] The rule is there stated to be that the contracting party must have sufficient intellectual capacity to comprehend what he is doing. If he possess less than this, whether by reason of general insanity, idiocy, or monomania affecting the particular subject-matter of the contract, it will not be binding upon him.

§ 462. **Mere weakness of mind insufficient.**—Mere imbecility or weakness of mind, whether it be congenital or the result of disease or decay of the faculties, is not, in the absence of evidence of undue advantage, a sufficient ground for avoiding a contract. Neither law nor equity will "graduate intellectual differences on a nicely adjusted scale." In Dennett v. Dennett[3] the fact is referred to that in former times it was held that the term *non compos mentis* imported a total deprivation of reason,[4] and that to invalidate a deed not a partial but an entire loss of understanding must be shown, because the common law seemed not to have drawn any discriminating line by which to determine how great the imbecility of mind must be to render a contract void, or how much intellect must remain to uphold it.[5] According to the modern rule, business incapacity is

[1] Baldwin v. Dunton, 40 Ill. 192. See Hovey v. Chase, 52 Me. 305; Stewart v. Lispenard, 26 Wend. (N. Y.) 255.

[2] 25 N. Y. 9.

[3] 44 N. H. 531.

[4] Beverley's Case, 4 Rep. 123b; 2 Mad. Ch. 727.

[5] See Jackson v. King, 4 Cow. (N. Y.) 216; s. c. 15 Am. Dec. 362, and note; Blanchard v. Nestle, 3 Denio (N. Y.) 41.

the test. Every person is deemed to be of unsound mind who has lost his memory and understanding by reason of old age, sickness, or other cause, so as to render him incapable of transacting his business and of managing his property.[1] When it appears that a grantor had not the strength of mind and reason to understand the nature and consequences of his act in making a deed, it may be avoided on the ground of insanity.[2] And where a person is likely to be easily influenced by others, by reason of infirmity and mental weakness arising from age, sickness, or other cause, transactions entered into by him without independent advice, will be set aside if there is any unfairness in them, such as inadequacy of consideration.[3] Unless facts are introduced showing inadequacy of consideration, or fraud or imposition, any degree of imbecility or insanity, short of total business incapacity, will not suffice to avoid an act or contract.[4] The Supreme Court of the United States in Conley v. Nailor,[5] after alluding to Harding v. Handy,[6]

[1] Matter of Barker, 2 Johns. Ch. (N. Y.) 232. See Clark v. Fisher, 1 Paige (N. Y.) 173; Ex'rs of Converse v. Converse, 21 Vt. 170.

[2] Davies v. Grindley, Shelf. Lun. 266.

[3] Allore v. Jewell, 94 U. S. 506. See Kempson v. Ashbee, L. R. 10 Ch. App. 15. Compare Harding v. Handy, 11 Wheat. 125; Ralston v. Turpin, 25 Fed. Rep. 12; Griffith v. Godey, 113 U. S. 95.

[4] See Petrie v. Shoemaker, 24 Wend. (N. Y.) 85; Person v. Warren, 14 Barb. (N. Y.) 488; Hirsch v. Trainer, 3 Abb. N. C. (N. Y.) 274; Darnell v. Rowland, 30 Ind. 342; Beller v. Jones, 22 Ark. 92; Henry v. Ritenour, 31 Ind. 136; Farnam v. Brooks, 9 Pick. (Mass.) 212; Clearwater v. Kimler, 43 Ill. 272; Mann v. Betterly, 21 Vt. 326; Sheldon v. Harding, 44 Ill. 74; Henderson v. McGregor, 30 Wis. 78. Where evidence of fraud or of undue advantage is given, imbecility or weakness of mind on the part of the party defrauded or overreached, may become a controlling circumstance. See Darnell v. Rowland, 30 Ind. 342; Henry v. Ritenour, 31 Ind. 136; Taylor v. Patrick, 1 Bibb (Ky.) 168; Seeley v. Price, 14 Mich. 541. But where a contract is impeached solely on the ground of the incapacity of one of the parties to it, and without any charge of fraud, the test of the capacity is the ability of such party to comprehend in a reasonable manner the nature of the particular transaction. Proof of delusion relating to independent subjects is not enough. Lozear v. Shields, 23 N. J. Eq. 509. It is sufficient if the mind fully comprehend the import of the particular act. Hovey v. Hobson, 55 Me. 256; Miller v. Craig, 36 Ill. 109; Speers v. Sewell, 4 Bush (Ky.) 239.

[5] 118 U. S. 133.

[6] 11 Wheat. 103.

and Allore v. Jewell,[1] say: "These cases establish the proposition that extreme weakness of intellect, even when not amounting to insanity, in the person executing a conveyance, may be sufficient ground for setting it aside when made upon a nominal or grossly inadequate consideration. Conceding the correctness of this legal proposition, it can have no application to the present case, unless the facts are substantially the same. A cursory reading of the cases will show such a palpable difference in the facts, as to make it clear that they cannot be taken as controlling authority in this. Cases like the present must each stand upon its own facts, and, when the testimony shows that the grantor was sober and capable and well knew what he was doing when he executed the deed, no other case materially differing in its facts can furnish a reason for setting aside the deed thus executed."

§ 463. **Lunatic's contracts for necessaries.**—The law seems to be settled that a lunatic is liable for necessaries suitable to his station.[2] In some cases the recovery is based upon a *quantum meruit*,[3] while in others the ground is taken that express contracts of lunatics for necessaries, if fair and reasonable, are binding.[4] In Wentworth v. Tubb[5] the court said: "Where necessaries are furnished to a lunatic, and no fraud or imposition is practiced upon him by the party furnishing them, the lunatic is bound to pay for them

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[1] 94 U. S. 506.

[2] Kendall v. May, 10 Allen (Mass.) 59; La Rue v. Gilkyson, 4 Pa. St. 375; Lancaster Co. Nat. Bank v. Moore, 78 Pa. St. 407; *Ex parte* Northington, 37 Ala. 496; Sawyer v. Lufkin, 56 Me. 308; Henry v. Fine, 23 Ark. 417; Richardson v. Strong, 13 Ired. Law (N. C.) 106; Van Horn v. Hann, 39 N. J. L. 207; Darby v. Cabanne, 1 Mo. App. 127; Baxter v. Earl of Portsmouth, 5 Barn. & C. 170; *In re* Persse, 3 Molloy 94; McCormick v. Littler, 85 Ill. 62; Nelson v. Duncombe, 9 Beav. 211.

[3] *Ex parte* Northington, 37 Ala. 496; Surles v. Pipkin, 69 N. C. 513; Hallett v. Oakes, 1 Cush. (Mass.) 296; Nelson v. Duncombe, 9 Beav. 211.

[4] Henry v. Fine, 23 Ark. 417; McCormick v. Littler, 85 Ill. 62; Richardson v. Strong, 13 Ired. Law (N. C.) 106.

[5] 1 N. Y. Leg. Obs. 282.

as being a debt due from him to such party, and if a debt upon his decease, his estate is chargeable with it."[1]

§ 464. **Acts of lunatic after inquisition void.**—Acts and contracts of a lunatic after a formal adjudication of lunacy and the appointment of a guardian or committee, are utterly void.[2] Where, however, the guardianship has been practically abandoned, or no guardian has been actually appointed, or the guardian has resigned without a successor having been appointed, it does not necessarily follow that the act is void.[3] And a deed executed by a person confined in an asylum was upheld,[4] where it appeared that he seemed to have some knowledge and judgment in relation to the transaction, and the conveyance had been taken by the grantees from kindly motives, with a view of carrying out a compromise with the creditors.

§ 465. **Judgment against lunatics under guardianship.**—A judgment rendered against a lunatic under guardianship is absolutely void, and may be set aside by a writ *audita querela*, the proceedings being *coram non judice*; and in such a case jurisdiction cannot be acquired by consent.[5]

§ 466. **Void and voidable acts of lunatics.**—A struggle similar to that in the law of infancy, to establish a voidable character for the contracts and acts of lunatics, is plainly to be traced in the authorities. There is indeed a strong inclination to place the acts of lunatics before office found on the same footing with those of infants.[6] In general the deed of an insane person will be treated as voidable rather than void.[7]

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[1] See Skidmore v. Romaine, 2 Bradford (N. Y.) 124; Barnes v. Hathaway, 66 Barb. (N. Y.) 456.

[2] Fitzhugh v. Wilcox, 12 Barb. (N. Y.) 235; Wadsworth v. Sherman, 14 Barb. (N. Y.) 169; Pearl v. McDowell, 3 J. J. Mar. (Ky.) 658; McCreight v. Aiken, Rice's (S. C.) Law 56; Elston v. Jasper, 45 Texas 409; Leonard v. Leonard, 14 Pick. (Mass.) 280.

[3] Mohr v. Tulip, 40 Wis. 66; Elston v. Jasper, 45 Texas 409.

[4] Selby v. Jackson, 13 L. J. Ch. 249.

[5] Miller v. Potter, 54 Vt. 268.

[6] See Ingraham v. Baldwin, 9 N. Y. 45.

[7] Jackson v. Gumaer, 2 Cow. (N. Y.) 552; Ingraham v. Baldwin, 9 N. Y. 45; Carrier v. Sears, 4 Allen (Mass.) 336; Gibson v. Soper, 6 Gray (Mass.)

§ 467. **Lunatic's deed.**—The English rule seems to have been to regard the deeds of insane persons as absolutely void.[1] In Eaton v. Eaton,[2] Scudder, J., said: "While it is doubtless the settled law in England, confirmed by act of Parliament, 7 and 8 Vict., c. 76, sec. 7, that a conveyance by feoffment or other assurance, as well as a deed of bargain and sale, release or grant, by an idiot or lunatic, is wholly void, yet the weight of authority in this country favors the rule that the conveyance by deed of persons of non-sane mind and of infants, are voidable and not wholly void." In Van Deusen v. Sweet[3] it is expressly held that the deed of a person *non compos mentis* is absolutely void. The court observed that if it was satisfactorily shown that the defendant was totally and positively incompetent to execute a valid deed, the instrument never had any existence as a deed, and was legally ineffectual and inoperative to pass a title to the premises. Lott, Ch. C., said: "It was not merely voidable, but absolutely void. It was in fact not his deed, never having had any legal existence or vitality. There was, consequently, nothing to be set aside by the interposition of a court of equity, or by recourse to an equitable action; but the fact of its absolute nullity was available to overcome and avoid the defense set up and interposed under it to defeat the plaintiff's claim and title." In Matter of Desilver's Estate,[4] a lunatic's bargain and sale deed was declared to be utterly void.

§ 468. **Executory contracts of lunatics.**—In general, the executory contracts of a lunatic are much more readily avoided than those which have been executed. Thus, in Musselman v. Cravens,[5] the court decided that a note vol-

279; Wait v. Maxwell, 5 Pick. (Mass.) 217; Key v. Davis, 1 Md. 32; Hovey v. Hobson, 53 Me. 453; Elston v. Jasper, 45 Texas 409; Eaton v. Eaton, 37 N. J. L. 108; Allen v. Berryhill, 27 Iowa 540.

[1] Thompson v. Leach, 3 Mod. 301; S. C. Ewell's Lea. Cas. 564.

[2] 37 N. J. L. 108, 117.

[3] 51 N. Y. 378, 384.

[4] 5 Rawle (Pa.) 110.

[5] 47 Ind. 1.

untarily given as a subscription to a college endowment might be avoided by a plea of insanity. It may be accepted as a general rule that a lunatic's executory contract cannot be enforced against him. In Van Patton v. Beals[1] a lunatic was held not to be bound by a note given for an antecedent debt. Again, in Lazell v. Pinnick,[2] it appeared that a party, in good faith, became bail for certain prisoners, relying upon a memorandum in writing signed by a lunatic, agreeing to indemnify him. The obligee being subsequently forced to satisfy the bond, it was held that the contract of indemnity could not be enforced against the lunatic. In Hicks v. Marshall[3] the court held that in an action on a promissory note, such a consideration must be shown to have been received, that justice and equity would require the debt to be paid out of the lunatic's estate.[4]

§ 469. **Statutory proceedings affecting property of infants and of lunatics.**—In New York, the application of a committee of a lunatic for permission to mortgage the lunatic's real estate must be accompanied by a bond, and a report of the agreement to mortgage must also be made to the court. If either of these prerequisites are neglected, the mortgage is absolutely void, and cannot be validated by allowing the committee to file the bond and report *nunc pro tunc*.[5] And in proceedings by an administrator to sell real estate to pay debts, in which the rights of infants are involved, the statute must be strictly pursued, and any substantial departure from its requirements renders the proceedings void.[6] In such cases, if no report of sale is filed by the administrator and confirmed before the con-

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[1] 46 Iowa 62.

[2] 1 Tyler (Vt.) 247.

[3] 8 Hun (N. Y.) 327.

[4] See Sentance v. Poole, 3 C. & P. 1; Dunnage v. White, 1 Wils. Ch. 67; Hall v. Warren, 9 Ves. 605.

[5] Agricultural Ins. Co. v. Barnard, 26 Hun (N. Y.) 302. See Bangs v. McIntosh, 23 Barb. (N. Y.) 591–601.

[6] Stilwell v. Swarthout, 81 N. Y. 114; Havens v. Sherman, 42 Barb. (N. Y.) 636.

veyance to the purchaser, the defect is fatal.[1] This rule is not necessarily limited to persons under disability, but is founded upon the principle that, where certain steps are authorized by statute in derogation of the common law, by which the title of one is to be divested and transferred to another, every requisite of the statute having the semblance of benefit to the former, must be strictly complied with, or the title will not pass.[2] In Matter of Valentine,[3] a proceeding for the sale of the real estate of a lunatic, Church, Ch. J., said: "The petition in this case was proper, and gave the court jurisdiction to proceed and determine the subject-matter involved, but it conferred jurisdiction to proceed not according to the discretion of the court, but in accordance with the statute. It was a special statutory jurisdiction, and could only be exercised as the statute directs. The statute[4] provides that on the presenting of such petition it *shall* be referred, etc. The referee is to examine into the truth of the representations made, to hear all parties interested in such real estate, and to report thereon. In this case no reference was made, and there was no hearing of the parties interested, and no report. We think that this requirement is substantial, and cannot be dispensed with."[5]

§ 470. **Voidable purchases by parties occupying positions of trust.**—Let us digress from the consideration of acts which are voidable by reason of mental imperfections in the actors, and notice the class of acts which may be avoided because a party, though *sui juris*, occupied a trust position toward the subject-matter of the contract. In Lytle v.

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[1] Rea v. McEachron, 13 Wend. (N. Y.) 465; Stilwell v. Swarthout, 81 N. Y. 114. See Battell v. Torrey, 65 N. Y. 294.

[2] Atkins v. Kinnan, 20 Wend. (N. Y.) 241, 249; Sharp v. Speir, 4 Hill (N. Y.) 76; Striker v. Kelly, 2 Denio (N. Y.) 323; Battell v. Torrey, 65 N. Y. 299; Ellwood v. Northrup, 106 N. Y. 185.

[3] 72 N. Y. 187.

[4] 2 R. S. N. Y., p. 54, § 12.

[5] See Ellwood v. Northrup, 106 N. Y. 185.

Beveridge,[1] Allen, J., delivering the opinion of the New York Court of Appeals, said: "A trustee, or one charged with the duty of protecting and caring for property as executor, trustee, agent, or otherwise, cannot deal with or become the purchaser of it for his own advantage, and to the prejudice of *cestuis que trust*, heirs, devisees, or principals. This principle is universal, and applies to all persons having a duty to perform in reference to a sale, inconsistent with the character of purchaser."[2] The same person cannot be both party and judge.[3] A director of a corporation occupies a *quasi* trust relationship to the stockholders and creditors of the corporation; his character is fiduciary; he is not at liberty to abuse the trust or confidence, and is under a disability as to dealings with the assets of the corporation for his personal benefit.[4] The rule is "founded upon the known weakness of human nature, and the peril of permitting any sort of collision between the personal interests of the individual and his duties as trustee, in his fiduciary character."[5]

In Wardell v. Railroad Company,[6] Field, J., said: "It hardly requires argument to show that the scheme thus designed to enable the directors, who authorized the contract, to divide with the contractors large sums which should have been saved to the company, was utterly indefensible and illegal. Those directors, constituting the executive committee of the board, were clothed with power to manage the affairs of the company for the benefit of its stockhold-

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[1] 58 N. Y. 606.

[2] Citing Torrey v. Bank of Orleans, 9 Paige (N. Y.) 649; Bridenbecker v. Lowell, 32 Barb. (N. Y.) 9; Dobson v. Racey, 3 Sandf. Ch. (N. Y.) 60; Moore v. Moore, 5 N. Y. 256. See Wilson v. Jordan, 3 Woods 642.

[3] Creveling v. Fritts, 34 N. J. Eq. 136.

[4] See Butts v. Wood, 37 N. Y. 317; Smith v. Lansing, 22 N. Y. 531; Hoyle v. Plattsburgh & M. R.R. Co., 54 N. Y. 328; Hallam v. Indianola Hotel Co., 56 Iowa 180; Twin Lick Oil Co. v. Marbury, 91 U. S. 587.

[5] Duncomb v. N. Y., H. & N. R.R. Co., 84 N. Y. 199. Citing Davoue v. Fanning, 2 Johns. Ch. (N. Y.) 260.

[6] 103 U. S. 657. See Meeker v. Winthrop Iron Co., 17 Fed. Rep. 48.

ers and creditors. Their character as agents forbade the exercise of their powers for their own personal ends against the interest of the company. They were thereby precluded from deriving any advantage from contracts, made by their authority as directors, except through the company for which they acted. Their position was one of great trust, and to engage in any matter for their personal advantage inconsistent with it was to violate their duty and to commit a fraud upon the company. It is among the rudiments of the law that the same person cannot act for himself and at the same time, with respect to the same matter, as the agent of another whose interests are conflicting. Thus a person cannot be a purchaser of property and at the same time the agent of the vendor. . . . . Directors of corporations, and all persons who stand in a fiduciary relation to other parties, and are clothed with power to act for them, are subject to this rule; they are not permitted to occupy a position which will conflict with the interest of parties they represent and are bound to protect. They cannot, as agents or trustees, enter into or authorize contracts on behalf of those for whom they are appointed to act, and then personally participate in the benefits."[1]

§ 471. **Voidable acts of executors or trustees.**—A purchase by an executor or trustee is voidable, as we shall see, only at the instance and election of the parties interested in the estate.[2] In Ives v. Ashley,[3] Chapman, J., commenting upon such a purchase, said: "The heirs may, within a reasonable time, elect to avoid it, and the purchaser is in such

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[1] See Thomas v. Brownville, F. K. & P. R.R. Co., 109 U. S. 524.

[2] Mercer v. Newsom, 23 Ga. 151; Mead v. Byington, 10 Vt. 116; Staples v. Staples, 24 Gratt. (Va.) 225; Ives v. Ashley, 97 Mass. 198; Graff v. Castleman, 5 Rand. (Va.) 195; s. c. 16 Am. Dec. 741; Myers v. Myers, 2 McCord's Ch. (S. C.) 214; s. c. 16 Am. Dec. 648; Marshall v. Carson, 38 N. J. Eq. 250; Van Epps v. Van Epps, 9 Paige (N. Y.) 237; Lytle v. Beveridge, 58 N. Y. 592; Bennett v. Austin, 81 N. Y. 308; Fulton v. Whitney, 66 N. Y. 548; Case v. Carroll, 35 N. Y. 385; Tiffany v. Clark, 58 N. Y. 632.

[3] 97 Mass. 198, 204.

case regarded as a trustee; or they may allow it to stand, and in such case it is valid without any further act." The sale will be regarded as effectual until avoided.[1] The doctrine that such a sale is fraudulent *per se*[2] is not generally acknowledged.[3] The facts, however, to effect an avoidance, must bring the case within the reason and spirit of the rule. Generally speaking, an administrator has no concern with, or authority or control over, the real estate of his intestate; he assumes no obligations in reference to it and owes no duty to the heirs. Hence the New York Commission of Appeals decided that an administrator was not precluded from purchasing at foreclosure sale real estate formerly belonging to the intestate, or from holding it absolutely in his own right.[4] It may be here observed that, though a trustee or executor acquires the title to the property through the interposition of a third party, this does not validate the transaction. Thus, in Boerum v. Schenck, in the New York Court of Appeals,[5] the learned Judge Woodruff said of a transaction of this kind: "A trustee or the donee of a power in trust cannot sell to himself either directly or indirectly; and this circuitous mode of effecting the transfer of the legal title cannot avail for that purpose." Where the chain of title disclosed a deed from an executor to a third party, and from the latter back to the individual

[1] Dunlap v. Mitchell, 10 Ohio 117.

[2] See Ely v. Horine, 5 Dana (Ky.) 398; Sheldon v. Rice, 30 Mich. 296; Miles v. Wheeler, 43 Ill. 123.

[3] See Mercer v. Newsom, 23 Ga. 151; McLane v. Spence, 6 Ala. 894; Mead v. Byington, 10 Vt. 116; Ives v. Ashley, 97 Mass. 198; Gilbert's Appeal, 78 Pa. St. 266; Staples v. Staples, 24 Gratt. (Va.) 225; Moses v. Moses, 50 Ga. 9.

[4] Hollingsworth v. Spaulding, 54 N. Y. 636. In Allen v. Gillette, 127 U. S. 596, Mr. Justice Lamar observed: "The principle that a trustee may purchase the trust property at a judicial sale brought about by a third party, which he had taken no part in procuring, and over which he could not have had control, is upheld by numerous decisions of this court and of other courts of this country. Prevost v. Gratz, 1 Pet. C. C. 364, 378; Twin Lick Oil Co. v. Marbury, 91 U. S. 587; Chorpenning's Appeal, 32 Pa. St. 315; Fisk v. Sarber, 6 W. & S. (Pa.) 18."

[5] 41 N. Y. 182.

who was executor, it was considered impossible to avoid the inference that the two conveyances were one transaction, and that the trustee acted in the double capacity of seller and purchaser of the property. The title was considered voidable at the instance of those whom the trustee was bound to protect, but whose interests were endangered by the collision with his own.[1] A purchaser cannot be forced to accept a title in this condition, especially after he has acquired knowledge of the facts, and would not, therefore, be protected as one buying in good faith and without knowledge of the breach of trust.[2]

§ 472. **Agent's voidable purchase.**—An agent will not be permitted to make any profit out of transactions connected with his agency, and, if he be an agent to sell property, must not be allowed to purchase it.[3] This doctrine is elementary.[4] So a man cannot be agent for both parties

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[1] People v. Open Board of Brokers, 92 N. Y. 103. Citing Davoue v. Fanning, 2 Johns. Ch. (N. Y.) 252; Gardner v. Ogden, 22 N. Y. 327; Forbes v. Halsey, 26 N. Y. 53; Van Epps v. Van Epps, 9 Paige (N. Y.) 237; Duncomb v. N. Y., H. & N. R.R. Co., 84 N. Y. 199.

[2] Wormley v. Wormley, 8 Wheat. 449. Trustees are never permitted, without the aid of the court, to buy the property which they hold as such. Carson v. Marshall, 28 Alb. L. J. 418, 419; S. C. 37 N. J. Eq. 213. See Creveling v. Fritts, 34 N. J. Eq. 134; Romaine v. Hendrickson, 27 N. J. Eq. 162; Colgate v. Colgate, 23 N. J. Eq. 372; Michoud v. Girod, 4 How. 503; Booraem v. Wells, 19 N. J. Eq. 87; Staats v. Bergen, 17 N. J. Eq. 297; S. C. on appeal, Id. 554; Jewett v. Miller, 10 N. Y. 402; Van Epps v. Van Epps, 9 Paige (N. Y.) 237; Fulton v. Whitney, 66 N. Y. 548; Bennett v. Austin, 81 N. Y. 308 332.

[3] Northern Pacific R.R. Co. v. Kindred, 3 McCrary 631. In Whitney v. Martine, 88 N. Y. 538, Miller, J., said: "When the relations of the contracting parties are such that they do not deal on terms of equality, a very strict rule prevails, and an agent or trustee who occupies such a position has no right to avail himself of his superior knowledge of the matter derived from the fiduciary relation, or influence or weakness, dependence or trust, to take an unfair advantage."

[4] Michoud v. Girod, 4 How. 503; Banks v. Judah, 8 Conn. 145; Davoue v. Fanning, 2 Johns. Ch. (N. Y.) 252; Barton v. Moss, 32 Ill. 50; Bentley v. Craven, 18 Beav. 75; Moore v. Moore, 5 N. Y. 262; Gardner v. Ogden, 22 N. Y. 347; Cumberland Coal Co. v. Sherman, 30 Barb. (N. Y.) 553; Conkey v. Bond, 36 N. Y. 427; Lewis v. Hillman, 3 H. L. Cas. 607; Cook v. Berlin Woolen Mills, 43 Wis. 433; Story on Agency, §§ 210, 211; Kerr on Fraud

where judgment or discretion is to be exercised.[1] The purchase by the agent of the principal's property without the consent of the latter is clearly voidable;[2] and where an agent employed to purchase land, fraudulently procures a conveyance in his own name, he will be declared a trustee, and directed to convey to his principal.[3] So, if an agent discovers a defect in the title of his principal to land, he cannot misuse the discovery to acquire the title for himself; if he do, he will be held a trustee for his principal.[4] In Moore v. Moore[5] it was held that an agent, employed to collect a mortgage belonging to his principal, could not be allowed either to purchase personally, or, through the agency of a third person, for his own benefit, but that such a purchase would be regarded as made for the benefit of the principal at his election. This rule is predicated upon the principle that it would be a dangerous policy to allow an agent to assume a position where his interests would be adverse to those of his employer. There is no distinction in this regard between a judicial and a private sale, where the agent controls it, and the officer acts under his instructions. "The relation," said Gardiner, J., "existing between the principal and his agent, with the unlimited confidence placed in the latter, called for the exercise of the most scrupulous integrity, and of a judgment unbiassed by his own personal interest." The principal contracts for the best judgment, skill, and exertions of the agent in his behalf. One who undertakes to act for another in any matter will not be permitted to act for himself in the same matter.[6]

& Mistake, 174, 175; *Ex parte* Hughes, 6 Ves. 617.

[1] Dunlop v. Richards, 2 E. D. Smith (N. Y.) 181; N. Y. Central Ins. Co. v. Nat. Protection Ins. Co., 14 N. Y. 85; Vanderpoel v. Kearns, 2 E. D. Smith (N. Y.) 170.

[2] See Switzer v. Skiles, 8 Ill. 529; s. c. 44 Am. Dec. 723; Moseley v. Buck, 3 Munf. (Va.) 232; s. c. 5 Am. Dec. 508; Robertson v. Western, etc. Ins. Co., 19 La. 227; s. c. 36 Am. Dec. 673; Florance v. Adams, 2 Rob. (La.) 556; s. c. 38 Am. Dec. 226.

[3] Pinnock v. Clough, 16 Vt. 500; s. c. 42 Am. Dec. 521.

[4] Ringo v. Binns, 10 Pet. 269.

[5] 5 N. Y. 256.

[6] Bain v. Brown, 56 N. Y. 285.

It is only by a rigid adherence to this simple rule that all temptation can be removed from one acting in a fiduciary capacity to abuse his trust, or seek his own advantage in the position which it affords him.[1]

§ 473. **Purchase by pledgee.**—The general rule is that the pledgee cannot purchase the pledge, and, to take the case out of the general rule, the right of the pledgee to become the purchaser must be given in very plain terms,[2] and his right to purchase must be assented to by the pledgor.[3] In Roach v. Duckworth,[4] Earl, J., said: "It is undoubtedly the rule that the pledgee cannot, at a sale by him of the property pledged, himself legally become the purchaser.[5] But the sale in such case is not absolutely void, but voidable only at the election of the pledgor. He may ratify the sale, and if he elects to do so, then the sale becomes perfectly valid and effectual. If, in this case, Cornell without fraudulent collusion with Duckworth assented to this sale, or with knowledge that Duckworth was really the purchaser in the name of Croker ratified the sale, then it was effectual and valid as against him, and Duckworth became the absolute owner of the bonds with a title as good against the whole world as he would have if he had purchased them at the time he took them in pledge. It does not appear in the record whether Cornell did or did not ratify the sale, and hence the case may here be disposed of upon the assumption that the sale was not binding upon him."

§ 474. **Purchase by attorney of client's property.**—As a general rule an attorney will not be permitted to purchase his client's property, at least without giving the latter the most

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[1] Dutton v. Willner, 52 N. Y. 318.

[2] Hamilton v. Schaack, 16 Weekly Dig. (N. Y.) 423.

[3] Bryan v. Baldwin, 52 N. Y. 235. See Torrey v. Bank of Orleans, 9 Paige (N. Y.) 649; Hawley v. Cramer, 4 Cow. (N. Y.) 736.

[4] 95 N. Y. 401.

[5] Citing Bryan v. Baldwin, 52 N. Y. 232. See Duncomb v. N. Y., H. & N. R.R. Co., 84 N. Y. 205.

complete information, and placing him upon his guard.[1] This rule is a necessity, and is founded upon the peculiarities of the relationship of attorney and client; upon the inequality between the contracting parties; the habitual exercise of power on the one side, and of submission on the other.[2] The attorney must be entirely open and frank throughout such a transaction, or equity will interfere,[3] as the presumption is against the attorney,[4] and there must be evidence to remove or overcome it;[5] otherwise it will be treated as a case of constructive fraud.[6] The New York Court of Appeals justly say that the rule which throws upon the attorney the burden of showing perfect fairness on his part in all his dealings with his client, and which renders it almost impossible for him to become the recipient of a gratuity or bounty from him, is based upon the consideration that the relations existing between the parties are such that the attorney has it in his power to avail himself of the necessities, liberality, or credulity of, and of his influence over, the client, and of the sense of dependence on the part of the latter upon his attorney, which always exists to a greater or less extent, and of the confidence which the client reposes in his attorney; and also upon the fact that it is difficult, and in most cases impossible, for the client to show that advantage has been taken of the relation.[7] The relationship begets the most unlimited confidence, and to permit the attorney to employ it to the

[1] See Rose v. Mynatt, 7 Yerg. (Tenn.) 30; Leisenring v. Black, 5 Watts (Pa.) 303; Hawley v. Cramer, 4 Cowen (N. Y.) 717; Carter v. Palmer, 8 Cl. & F. 657; Howell v. Baker, 4 Johns. Ch. (N. Y.) 118; Weeks on Attorneys at Law, § 273; Nesbit v. Lockman, 34 N. Y. 169.

[2] Casborne v. Barsham, 2 Beav. 78.

[3] See Edwards v. Meyrick, 12 L. J. Ch. 52; Wood v. Downe, 18 Ves. 120; Lewis v. Hillman, 3 H. L. Cas. 607.

[4] Whitehead v. Kennedy, 7 Hun (N. Y.) 230; Brock v. Barnes, 40 Barb. (N. Y.) 521; Savery v. King, 35 Eng. Law & Eq. 100, 104; Ford v. Harrington, 16 N. Y. 285.

[5] Savery v. King, 35 Eng. Law & Eq. 100, 104.

[6] Jennings v. McConnel, 17 Ill. 148; Dunn v. Record, 63 Me. 17; Kisling v. Shaw, 33 Cal. 425.

[7] Ford v. Harrington, 16 N. Y. 289; Nesbit v. Lockman, 34 N. Y. 169.

prejudice of his client would be subjecting him to "a crushing influence."[1] For the same general reasons an attorney is not permitted to purchase the subject-matter of the litigation.[2] Such purchases have been held absolutely void.[3] It can, however, scarcely be said to be the policy of the law, to declare that a lawyer shall not have the power to purchase property from his client;[4] on the contrary, the evident purpose of the rule is to carefully scrutinize such transactions, and impose upon the attorney the burden of demonstrating that the price is fair, and as large as could possibly have been obtained from a stranger.[5]

§ 475. **Transactions between parent and child.**—Transactions, contracts, and dealings between parent and child, it has been asserted, are sometimes classed with those between attorney and client, and courts scrutinize such dealings, and interpose to set aside such contracts substantially for the same reasons in the one case as in the other.[6] The court in Cowee v. Cornell,[7] alluding to the presumption against transactions where trust relations ex-

[1] Miles v. Ervin, 1 McCord's Ch. (S. C.) 524; Yeamans v. James, 27 Kan. 207. In Matter of Will of Smith, 95 N. Y. 523, Andrews, J., said: "The mere fact, therefore, that the proponent was the attorney of the testatrix did not, according to the authorities cited, create a presumption against the validity of the legacy given by her will. But taking all the circumstances together — the fiduciary relation, the change of testamentary intention, the age, and mental and physical condition of the decedent, the fact that the proponent was the draftsman and principal beneficiary under the will and took an active part in procuring its execution, and that the testatrix acted without independent advice, a case was made which required explanation, and which imposed upon the proponent the burden of satisfying the court that the will was the free, untrammeled, and intelligent expression of the wishes and intention of the testatrix." Compare Nesbit v. Lockman, 34 N. Y. 169; Cowee v. Cornell, 75 N. Y. 100.

[2] Hall v. Hallet, 1 Cox's Eq. 134.

[3] West v. Raymond, 21 Ind. 305. See Harper v. Perry, 28 Iowa 57; Simpson v. Lamb, 40 Eng. L. & Eq. 59.

[4] Hess v. Voss, 52 Ill. 472; Roman v. Mali, 42 Md. 513.

[5] See Yeamans v. James, 27 Kan. 195.

[6] Ford v. Harrington, 16 N. Y. 292; 1 Story's Eq. Jur. §§ 307–310. See Cowee v. Cornell, 75 N. Y. 91; Carpenter v. Soule, 88 N. Y. 256; Whitney v. Martine, 88 N. Y. 538; Matter of Will of Smith, 95 N. Y. 523.

[7] 75 N. Y. 91, 101.

ist, say: "The trust and confidence, or the superiority on one side and weakness on the other must be proved in each of these cases; the law does not presume them from the fact, for instance, that one party is a grandfather and old, and the other a grandson and young, or that one is an employer and the other an *employé*."

§ 476. Other phases—Legal effect of drunkenness.—It cannot be laid down as a rule that because a man is a drunkard he is of unsound mind.[1] In Peck v. Cary,[2] a will case, the test is stated to be, that "in order to vitiate the act the testator must, at the time of executing the paper, have been under the influence of intoxicating liquor, and to such a degree as to disorder his faculties and pervert his judgment." In Pierce v. Pierce[3] it is said that the drunkenness must exist "to such an extent as to deprive a testator of the power of controlling his conduct, and knowing what he is about."[4] In Van Wyck v. Brasher,[5] Earl, J., said: "A drunkard is not incompetent like an idiot or one generally insane. He is simply incompetent upon proof that at the time of the act challenged his understanding was clouded or his reason dethroned by actual intoxication."[6] It is generally a question of fact for the court or jury to determine whether inebriety has had the effect of rendering a man's mind unsound, either permanently or temporarily, covering the time of the performance of the act under consideration.[7]

Habitual drunkenness does not, as matter of law, ren-

[1] Estate of Johnson, 57 Cal. 529.

[2] 27 N. Y. 20.

[3] 38 Mich. 417.

[4] See, further, Estate of Cunningham, 52 Cal. 465; Duffield v. Morris, 2 Harr. (Del.) 375; Nussear v. Arnold, 13 S. & R. (Pa.) 323; Brown v. Torrey, 24 Barb. (N. Y.) 583; Waters v. Cullen, 2 Bradf. (N. Y.) 354; Key v. Holloway, 7 Baxter (Tenn.) 575; S. C. 1 Am. Prob. Rep. 360, and note of the editor; Down v. McGourkey, 15 Hun (N. Y.) 444, affi'd 78 N. Y. 614.

[5] 81 N. Y. 262.

[6] Citing Peck v. Cary, 27 N. Y. 9; Gardner v. Gardner, 22 Wend. (N. Y.) 526.

[7] Estate of Johnson, 57 Cal. 529; S. C. 2 American Probate Rep. 524, and the learned note of Wm. W. Ladd, Esq., the editor.

der a man incapable of making a will. No presumption of incapacity attaches.[1] A person adjudged an habitual drunkard, may even make a valid will while subject to the commission. The existence of the commission is only *prima facie* evidence of incapacity, which may be rebutted.[2] It may be noted, however, that a greater degree of capacity is in general required to make a contract than to make a will.[3]

§ 477. **Delirium tremens as distinguished from drunken madness.**—In United States v. McGlue[4] the learned Judge Curtis, in charging the jury, said: "Although delirium tremens is the product of intemperance, and therefore in some sense is voluntarily brought on, yet it is distinguishable, and by the law is distinguished from that madness which sometimes accompanies drunkenness. If a person suffering under delirium tremens is so far insane as I have described to be necessary to render him irresponsible, the law does not punish him for any crime he may commit. But if a person commits a crime under the immediate influence of liquor, and while intoxicated, the law does punish him, however mad he may have been. It is no excuse, but rather an aggravation of his offense that he first deprived himself of his reason before he did the act. . . . . It is an inquiry of great importance in this case . . . .

[1] See Gardner v. Gardner, 22 Wend. (N. Y.) 526; Lewis v. Jones, 50 Barb. (N. Y.) 645; Matter of Patterson, 4 How. Pr. (N. Y.) 34; Thompson v. Kyner, 65 Pa. St. 368; Leckey v. Cunningham, 56 Pa. St. 370; Pierce v. Pierce, 38 Mich. 412.

[2] Lewis v. Jones, 50 Barb. (N. Y.) 645. See Stone v. Damon, 12 Mass. 488; Breed v. Pratt, 18 Pick. (Mass.) 115.

[3] Ritter's Appeal, 59 Pa. St. 9; Warnock v. Campbell, 25 N. J. Eq. 485; Butler v. Mulvihill, 1 Bligh 137. In Peck v. Cary, 27 N. Y. 23, Chief-Justice Denio said: "It is not the law that a dissipated man cannot make a contract or execute a will, nor that one who is in the habit of excessive indulgence in strong drink, must be wholly free from its influence when performing such acts. If fixed mental disease has supervened upon intemperate habits, the man is incompetent and irresponsible for his acts. If he is so excited by present intoxication as not to be master of himself, his legal acts are void, though he may be responsible for his crimes." See, further, Turner v. Cheesman, 15 N. J. Eq. 243.

[4] Curtis' C. C. 12.

whether this homicide was committed while the prisoner was suffering under that marked and settled disease of delirium tremens, or in a fit of drunken madness."[1] So a marriage will not be rendered void because entered into while the party was intoxicated, while insanity from delirium tremens produced by intoxication will avoid it.[2]

§ 478. **Duress; its nature and classes.**—Cases in which acts are avoided for duress not infrequently command the attention of the courts. Duress, in its more extended sense, signifies that degree of severity, either threatened or impending, or actually inflicted, which is sufficient to overcome the mind and will of a person of ordinary firmness.[3] When the contract is made under such circumstances it is said to be void,[4] which generally means that it may be avoided. The common law has divided duress into two classes, namely, duress of imprisonment, and duress *per minas*. It may be observed at the outset that it is not duress for a party to insist upon his legal rights.[5]

Where a woman was induced to do an act under a representation that it was the only thing that would save her son from imprisonment, or the act was induced by threats of suicide on his part, this was held, in the New York Court of Appeals, not to be duress in a legal sense.[6] But, on the other hand, a promissory note obtained from a married woman by duress, though it falsely stated that it was given

[1] See, further, United States v. Drew, 5 Mason 28; United States v. Forbes, Crabbe 558; Bennett v. State, Mart. & Yerg. (Tenn.) 133; Carter v. State, 12 Texas 500; Bales v. State, 3 W. Va. 685; People v. Rogers, 18 N. Y. 9.

[2] See Clement v. Mattison, 3 Rich. Law (S. C.) 93.

[3] Fellows v. School District, 39 Me. 561.

[4] Burr v. Burton, 18 Ark. 214.

[5] McPherson v. Cox, 86 N. Y. 478. "Duress, which is another ground on which a contract is voidable, consists either in violence to the person, or in threatened violence of the same character 'duress *per minas*.' It will not be enough if the safety of a man's house or goods only be threatened, and the fear caused must be, as has been said, 'not a vain fear but such as may befall a constant man'; '*vani timoris justa excusatio non est*.'" Holland's Jurisprudence, p. 200.

[6] Metropolitan Life Ins. Co. v. Meeker, 85 N. Y. 614.

for the benefit of her separate estate, cannot be enforced, even in the hands of a *bona fide* holder for value.[1] In Baker v. Morton,[2] Mr. Justice Clifford observed: "Actual violence is not necessary to constitute duress even at common law, as understood in the parent country, because consent is the very essence of a contract, and if there be compulsion there is no consent, and it is well-settled law that moral compulsion, such as that produced by threats to take life or to inflict great bodily harm, as well as that produced by imprisonment, is sufficient to destroy free agency, without which there can be no contract, as in that state of the case there is no consent.[3] Where a party enters into a contract for fear of loss of life, or for fear of loss of limb, or fear of mayhem, or for fear of imprisonment, the contract is as clearly void as when it was procured by duress of imprisonment, which is where there is an arrest for an improper purpose without just cause, or where there is an arrest for a just cause but without lawful authority, or for a just cause but for an unlawful purpose, and the rule is that in either of those events the party arrested, if he was thereby induced to enter into a contract, may avoid it as one procured by duress."

§ 479. **Duress of goods.**—Money paid under duress of goods may be recovered back; such payments cannot be regarded as voluntary.[4] Where a person gets possession of a deed, and, by threatening to destroy it, extorts money from another who is interested in it, the payment so made is involuntary, and the money may be recovered back.[5] An

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[1] Loomis v. Ruck, 56 N. Y. 462.

[2] 12 Wall. 150, 157.

[3] Citing Chitty on Contracts 192; 2 Greenl. Ev. 283; Co. Second Inst. 482; 2 Rolle's Abr. 124; Richardson v. Duncan, 3 N. H. 508; Watkins v. Baird, 6 Mass. 511.

[4] Scholey v. Mumford, 60 N. Y. 498; Baldwin v. Liverpool and Great Western Steamship Co., 74 N. Y. 125; Shaw v. Woodcock, 7 Barn. & C. 73; Briggs v. Boyd, 56 N. Y. 293; Cook v. City of Boston, 9 Allen (Mass.) 393; McPherson v. Cox, 86 N. Y. 472; Benson v. Monroe, 7 Cush. (Mass.) 125. See note to London & N. W. Ry. Co. v. Evershed, 24 Moak's Eng. Rep. 634.

[5] Motz v. Mitchell, 91 Pa. St. 114.

important principle must be noticed in this connection. In Chandler v. Sanger[1] it was held that money paid by a party to free his goods from an attachment levied for the purpose of extorting money, by a person who knew he had no cause of action, could be recovered back in assumpsit for money had and received, "without proof of such a termination of the former suit as would be necessary to maintain an action for malicious prosecution."[2]

In Harmony v. Bingham,[3] Ruggles, J., said: "When a party is compelled, by duress of his person or goods, to pay money for which he is not liable, it is not voluntary but compulsory. Where the owner's goods are unjustly detained on pretence of a lien which does not exist, he may have such an immediate want of his goods that an action at law will not answer his purpose. The delay may be more disadvantageous than the loss of the sum demanded. The owner, in such case, ought not to be subjected to the one or the other, and, to avoid the inconvenience or loss, he may pay the money, relying on his legal remedy to get it back again." Where a person who paid tolls to a navigation company denied at the time of payment its right to exact the tolls, and paid them only because the company threatened, in case of non-payment, to stop his business, which it was able to do, it was held that the payment was not voluntary, and that the amount paid could be recovered back if the tolls were unlawfully exacted.[4] Where a pawnbroker refused to deliver pawned plate except upon payment of excessive interest, and the owner paid it to obtain his property, he was allowed to recover back the excess.[5]

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[1] 114 Mass. 365.

[2] See Watkins v. Baird, 6 Mass. 506; Shaw, C. J., in Preston v. Boston, 12 Pick. (Mass.) 7, 14; Benson v. Monroe, 7 Cush. (Mass.) 125–131; Carew v. Rutherford, 106 Mass. 1, 11, *et seq.*; Richardson v. Duncan, 3 N. H. 508; Sartwell v. Horton, 28 Vt. 370; Colwell v. Peden, 3 Watts (Pa.) 328; Cadaval v. Collins, 4 Adol. & El. 858; s. c. 6 Nev. & Man. 324; Oates v. Hudson, 6 Exch. 348.

[3] 12 N. Y. 116.

[4] Lehigh Coal Co. v. Brown, 100 Pa. St. 338; s. c. 27 Alb. L. J. 499.

[5] Astley v. Reynolds, 2 Stra. 915.

An action will lie to recover back money paid for goods unlawfully detained under a pretended lien,[1] or money wrongfully exacted by a corporation as a condition of permitting a transfer of stock.[2]

§ 480. **Involuntary payments.**—The Supreme Court of the United States say, that to constitute coercion or duress sufficient to render a payment involuntary, there must be some actual or threatened exercise of power possessed, or believed to be possessed, by the party exacting or receiving the payment, over the person or property of the other, from which the latter has no other means of immediate relief than by making the payment.[3] And, it is stated in the Court of Appeals of Maryland, that "a payment is not to be regarded as compulsory unless made to emancipate the person or property from an actual and existing duress, imposed upon it by the party to whom the money is paid."[4]

§ 481. **Undue influence.**—"What is known in English law as 'undue influence' is also held to make a contract voidable.[5] This consists in acts which, though not fraudulent, amount to an abuse of the power, which circumstances have given to the will of one individual over that of another. In some relations, such as that of solicitor and client, or parent and child, the existence of this exceptional power is often presumed, but its existence is capable of being proved in other cases also."[6] A conveyance obtained by one person from another, where advantage is taken of

[1] Ashmole v. Wainwright, 2 Ad. & El. (N. S.) 837; Harmony v. Bingham, 12 N. Y. 109, 116; Briggs v. Boyd, 56 N. Y. 293.

[2] Bates v. N. Y. Ins. Co., 3 Johns. Cas. (N. Y.) 238.

[3] Radich v. Hutchins, 95 U. S. 213.

[4] Mayor of Baltimore v. Lefferman, 4 Gill (Md.) 436. See Brumagim v. Tillinghast, 18 Cal. 265; Mays v. Cincinnati, 1 Ohio St. 268; Fleetwood v. City of New York, 2 Sandf. (N. Y.) 475; Harmony v. Bingham, 12 N. Y. 112.

[5] Davis v. Calvert, 5 Gill & J. (Md.) 269; Eckert v. Flowry, 43 Pa. St. 46; Conley v. Nailor, 118 U. S. 135.

[6] Holland's Jurisprudence, p. 200. See § 13, note.

the latter's weakness or clouded or enfeebled faculties, will not be sustained by a court of equity. But it is not sufficient to suggest mere weakness or indiscretion of the party conveying; it must be shown that there was fraud in the party contracting, or some undue means made use of to control that weakness; and, in such case, though fraud be found, it does not necessarily follow in equity that the deed must be absolutely set aside as void; it may be allowed to stand as security for whatever amount, if any, may be found to have been actually due between the parties.[1] In order to avoid a grant on the ground of undue influence, it must be shown that the influence existed, and was exercised for an undue and disadvantageous purpose. The cause of the weakness of mind is not material. It may be from duress, general imbecility, accidental depression, constitutional despondency, or the result of sudden fear or apprehension.

"Undue influence," said Andrews, J.,[2] "which is a species of fraud, when relied upon to annul a transaction *inter partes*, or a testamentary disposition, must be proved, and cannot be presumed. But the relation in which the parties to a transaction stand to each other, is often a material circumstance and may of itself in some cases be sufficient to raise a presumption of its existence." In the celebrated case of Marx v. McGlynn,[3] Earl, J., uses these words: "Undue influence may be exercised by physical coercion or by threats of personal harm and duress, by which a person is compelled, really against his will, to make a testamentary disposition of his property. That kind of undue influence can never be presumed. It must be shown by evidence legitimately proving the facts, and where it is established the will cannot be admitted to probate, for the

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[1] Anthony v. Hutchins, 10 R. I. 165. See §§ 192–195.

[2] Matter of Will of Smith, 95 N.Y. 522.

[3] 88 N. Y. 370. See Loder v. Whelpley, 111 N. Y. 250.

reason that it is not the will of the testator. There is another kind of undue influence more common than that just referred to, and that is where the mind and the will of the testator has been overpowered and subjected to the will of another, so that while the testator willingly and intelligently executed a will, yet it was really the will of another, induced by the overpowering influence exercised upon a weak or impaired mind. Such a will may be procured by working upon the fears or the hopes of a weak-minded person; by artful and cunning contrivances; by constant pressure, persuasion, and effort, so that the mind of the testator is not left free to act intelligently and understandingly. It is not sufficient, however, for the purpose of establishing undue influence, to show that the will is the result of affection or gratitude, or the persuasion which a friend or relative may legitimately use; but the influence must be such as to overpower and subject the will of the testator, thus producing a disposition of property which the testator would not have made if left freely to act his own pleasure, and this kind of influence will not generally be presumed, but must be proved like any other fact by him who alleges it."

Whenever one party is so situated as to exercise a controlling influence over the will, conduct, and interests of another, contracts then made will be set aside, even upon slight evidence of the improper exercise of such influence.[1]

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[1] The People v. Young Men's, etc. Society, 65 Barb. (N. Y.) 357. See Sears v. Shafer, 6 N. Y. 268; Casborne v. Barsham, 2 Beav. 76; Dent v. Bennett, 7 Simons 539; Eadie v. Slimmon, 26 N. Y. 9.

CHAPTER III.

RATIFICATION OR AFFIRMANCE OF VOIDABLE ACTS.

§ 482. Affirmance of voidable acts.
483. Knowledge essential to ratification—Effect.
484. Affirmance of executors' voidable acts.
485. Receipt of proceeds of sale under protest.
486. Executor's title.
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488. Ratification of infant's voidable act.
§ 489. No ratification of void act.
490. Ratifying void bill of lading.
491. Facts insufficient to constitute ratification by acquiescence.
492. Lord Tenterden's Act.
493. Affirmance by retention of the property.
494. Affirmance of voidable corporate acts.
495. Affirmance effected by laches.

§ 482. **Affirmance of voidable acts.**—Ratification of the unauthorized act of another operates upon the act ratified precisely the same as though the authority to do the act had been previously given.[1] It is, in other words, equivalent to a prior authorization.[2] Thus the act of one assuming to be an agent, but done without authority, may be ratified, and in such case the liability of the principal arises from the ratification.[3] It follows that a ratification can only be made when the party ratifying possesses the power to perform the act ratified.[4] In order to operate as a con-

[1] Cook v. Tullis, 18 Wall. 332.

[2] Sheldon H. B. Co. v. Eickemeyer H. B. M. Co., 90 N. Y. 613.

[3] Conrad v. Abbott, 132 Mass. 331. See Clement v. Jones, 12 Mass. 60; Pratt v. Putnam, 13 Mass. 361; Fisher v. Willard, 13 Mass. 379; Emerson v. Newbury, 13 Pick. (Mass.) 377; Shaw v. Nudd, 8 Pick. (Mass.) 9; Hewes v. Parkman, 20 Pick. (Mass.) 90.

[4] Marsh v. Fulton Co., 10 Wall. 683. In this case Mr. Justice Field remarked: "It is also contended that if the bonds in suit were issued without authority their issue was subsequently ratified, and various acts of the supervisors of the county are cited in support of the supposed ratification. These acts fall very far short of showing any attempted ratification even by the supervisors. But the answer to them all is that the power of ratification did not lie with

firmation, the act of the party must be intended to be a direct recognition and acknowledgment of the validity of the transfer, and not the result of a mere collateral agreement.[1] It is said that there are three ways of affirming the voidable contract of an infant: *First*, by an express ratification; *second*, by the performance of acts from which an affirmance may reasonably be implied; and *thirdly*, by the omission to disaffirm within a reasonable time.[2]

§ 483. **Knowledge essential to ratification—Effect.**—The rule that a ratification of an unauthorized act of an agent, to be binding, must be made with full knowledge of the facts, is sound in principle and firmly established by authority.[3] Confirmation and ratification imply to legal minds knowledge of the defects in the act to be confirmed, and of the right to reject or ratify it.[4] Hence a *cestui que trust*, against whom it is sought to establish a ratification, must not only have been acquainted with the facts, but must also have been apprised of the law as to how those

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the supervisors. A ratification is, in its effect upon the act of an agent, equivalent to the possession by him of a previous authority. It operates upon the act ratified in the same manner as though the authority of the agent to do the act existed originally. It follows that a ratification can only be made when the party ratifying possesses the power to perform the act ratified. The supervisors possessed no authority to make the subscription or issue the bonds in the first instance without the previous sanction of the qualified voters of the county. The supervisors in that particular were the mere agents of the county. They could not, therefore, ratify a subscription without a vote of the county, because they could not make a subscription in the first instance without such authorization. It would be absurd to say that they could, without such vote, by simple expressions of approval, or in some other indirect way, give validity to acts, when they were directly in terms prohibited by statute from doing those acts until after such vote was had. That would be equivalent to saying that an agent, not having the power to do a particular act for his principal, could give validity to such act by its indirect recognition."

[1] Stout v. Stout, 77 Ind. 537.

[2] Kline v. Beebe, 6 Conn. 494.

[3] McClelland v. Whiteley, 15 Fed. Rep. 327; Owings v. Hull, 9 Pet. 607; Combs v. Scott, 12 Allen (Mass.) 493; Pittsburgh & S. R.R. Co. v. Gazzam, 32 Pa. St. 340. See Craighead v. Peterson, 72 N. Y. 279; Yellow Jacket S. M. Co. v. Stevenson, 5 Nev. 224; Gilman, C. & S. R.R. Co. v. Kelly, 77 Ill. 426.

[4] Adair v. Brimmer, 74 N. Y. 554. See Ritch v. Smith, 82 N. Y. 627.

facts would have been dealt with by a court of equity. And all that is implied in the act of ratification, when set up in equity by a trustee against his *cestui que trust*, must be proved, and will not be assumed. The maxim, "*ignorantia legis excusat neminem*," cannot be invoked in such a case. Proof must be adduced that the *cestui que trust* was apprised of his legal rights.[1] In Benninghoff v. Agricultural Insurance Company,[2] Ruger, Ch. J., made use of this language: "It is essential to the validity of an act which is claimed to have been authorized by a subsequent ratification thereof, that the principal should have had full knowledge of the circumstances attending the performance of the act of the assumed agent at the time of such ratification." In a recent case Gray, J., remarked: "Ratification implies a knowledge of the circumstances, and of the right to reject or ratify."[3] The maxim, "*omnis ratihabitio retrotrahitur et mandato priori æquiparatur*," is frequently invoked by parties claiming the benefits of a ratification, and asserting that it has the same effect as a prior command.[4] It may be noted that the law does not admit of a ratification which will defeat the intervening rights of third parties, and that it does not matter whether the third party is an individual or a corporation.[5]

§ 484. Affirmance of executors' voidable acts.—In Pease v. Creque[6] it appeared that a deed of real property had

[1] Adair v. Brimmer, 74 N. Y. 554. See Cumberland Coal Co. v. Sherman, 30 Barb. (N. Y.) 575; Lammot v. Bowly, 6 H. & J. (Md.) 526.

[2] 93 N. Y. 501.

[3] King v. Mackellar, 109 N. Y. 223. Citing Nixon v. Palmer, 8 N. Y. 398; Baldwin v. Burrows, 47 N. Y. 199; Adair v. Brimmer, 74 N. Y. 554; Whitney v. Martine, 88 N. Y. 535, 540.

[4] See Broom's Legal Maxims, p. 866; Co. Litt. 207*a*; Simpson v. Eggington, 10 Exch. 845; Earl of Mountcashell v. Barber, 14 C. B. 53; Maclae v. Sutherland, 3 El. & B. 1; Fagan v. Harrison, 8 C. B. 388; Foster v. Bates, 12 M. & W. 226; Heslop v. Baker, 8 Exch. 417; Robinson v. Gleadow, 2 Bing. N. C. 156, 161.

[5] See Consolidated Fruit Jar Co. v. Bellaire Stamping Co., 27 Fed. Rep. 382; Wood v. McCain, 7 Ala. 800; Stoddard v. United States, 4 Ct. of Claims 511; Doe *d.* Lyster v. Goldwin, 2 Q. B. 143; Doe *d.* Mann v. Walters, 10 Barn. & C. 626; Cook v. Tullis, 18 Wall. 332.

[6] 15 Weekly Digest (N. Y.) 15.

been made by executors to one of themselves. The court applied the familiar rule that the deed was not absolutely void, but merely voidable at the election of the legatees under the will.[1] It appearing that one of the legatees, with full knowledge of the facts, had received the proceeds of the sale in payment of his legacy, this acceptance of the money was held to be an affirmance and ratification of the deed to the executor, and the court ruled that the legatee could not be allowed thereafter to avoid the transfer to the prejudice of a mortgagee who, relying upon such ratification,[2] had loaned money upon the land. The beneficiary or *cestui que trust* in such a transaction, may, if *sui juris*, elect to hold the trustee to the consequences of his act;[3] and where no legal incapacity is shown in the beneficiary, and he has full knowledge of all the facts, and is wholly free from any undue influence arising out of the peculiar trust relations of the parties, a clear and unequivocal affirmance of the sale may conclude him. "Ordinarily, the acceptance of the money, with full knowledge and by persons free from disability, would be such an affirmance." This is especially so as regards third parties who have advanced moneys or acquired rights upon the faith of the acquiescence. In such a case an element of estoppel is introduced.

§ 485. **Receipt of proceeds of sale under protest.**—As between the immediate parties, however, it seems, according to some of the authorities, that the act is open to explanation, and, where the proceeds of such a sale or disposition of the property are merely received under protest, and with an express reservation of the right to controvert the valid-

[1] See Van Epps v. Van Epps, 9 Paige (N. Y.) 238; Fulton v. Whitney, 66 N. Y. 548; Bennett v. Austin, 81 N. Y. 308; Welch v. McGrath, 59 Iowa 519; s. c. 26 Alb. L. J. 540.

[2] See Boerum v. Schenck, 41 N. Y. 182.

[3] Boerum v. Schenck, 41 N. Y. 182; Lingke v. Wilkinson, 57 N. Y. 452; Second National Bank v. Burt, 93 N. Y. 249.

ity of the sale, such action was held not to estop or preclude a subsequent proceeding by the beneficiary to disaffirm the transaction, and obtain a resale. A receipt given under these circumstances was held by the New York Court of Appeals to possess none of the characteristics of an estoppel. It is a mere consent to receive the money claimed to be the proceeds of a valid sale, reserving the right to contest the question of validity, or, excluding the otherwise apparent and implied intent thereby to affirm such validity. It admits nothing; it misleads no one; it can work no fraud upon any person. Not one of the requisites of an equitable estoppel, or estoppel *in pais*, can be found in it.[1] Such is the argument advanced. The principle seems novel, that a beneficiary can receive the purchase-money, as the proceeds of a valid sale, and also be allowed to set aside the sale as invalid. This result conflicts with the spirit of the familiar rule that a rescission or disaffirmance must be *in toto*. Probably the true theory is that the beneficiary is entitled to rescue so much of the estate from the dishonest trustee, instead of being forced to rely upon his personal responsibility.

§ 486. **Executor's title.**—An executor who has made a sale of property belonging to his trust estate to one who may acquire a good title to it, may buy the property from him, and thereby acquire the title of such purchaser.[2] So held in Silverthorn v. McKinster,[3] where the executors sold the property to one Burns, from whom one of the executors subsequently purchased it. The court said: "As, then, ... Burns was by the sale invested with an estate recognized by our laws, there was nothing to hinder him from selling and conveying it to whomsoever he pleased. Nor is there anything in the law or the transaction itself to pro-

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[1] Boerum v. Schenck, 41 N. Y. 182.

[2] Welch v. McGrath, 59 Iowa 519; s. c. 26 Alb. L. J. 540.

[3] 12 Pa. St. 71.

hibit Isaac Silverthorn (the executor) from becoming the purchaser. There is no suggestion of *mala fides* in the sale made by the executors to Burns, and it is clear that, in the absence of fraud, one who has sold an estate as a trustee may afterwards fairly re-purchase it for himself."[1] There is no distinction between a purchase made by a trustee invested with the legal title at a sale made by him pursuant to the trust and a like purchase by one having a power in trust merely, at a sale made by virtue of such power in trust. The same reasons for holding the purchases voidable at the election of the beneficiaries are equally applicable to both sales, and the same rule should be applied. Nor does the right of the beneficiaries to repudiate the transaction rest upon proof of actual intent to cheat or defraud. Neither uprightness of intention nor the payment of a fair or adequate price or consideration will overcome the impediment. While the chief design of the rule is to shield and protect the beneficiaries from the fraud or bad faith of the trustee, yet the peculiar relation of the parties renders it unsafe and imprudent to allow any exception to it.

§ 487. **Avoidance a personal right.**—The rule is not confined to trustees or others who hold the legal title to the property to be sold, but applies universally to all who come within its principle, which is, that no party can be permitted to purchase an interest in property, and hold it for his own benefit, where he has a duty to perform in relation to such property which is inconsistent with the character of a purchaser on his own account.[2] The right to elect to avoid

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[1] Citing Painter v. Henderson, 7 Pa. St. 48.

[2] Fulton v. Whitney, 66 N. Y. 548; Bennett v. Austin, 81 N. Y. 308–322. In Scholle v. Scholle, 101 N. Y. 171, Earl, J., said: "The general rule is not disputed that the purchase by a trustee directly or indirectly of any part of a trust estate which he is empowered to sell, as trustee, whether at public auction or private sale, is voidable at the election of the beneficiaries of the trust; and this rule will be enforced without regard to the question of good faith or adequacy of price, and whether the trustee has or has not a personal interest in the same property. Nor is it sufficient to enable a trustee to make

the sale, however, is the exclusive privilege of the *cestui que trust* or beneficiary, just as the defense of infancy, or the right to avoid a contract on the ground of infancy, is the exclusive privilege of the infant. A stranger cannot interfere to avoid the sale.[1] In Beardsley v. Hotchkiss,[2] Earl, J., said: "As to contracts purely executory it must be shown that the infant ratified them after he became of age before they can be enforced against him. As to contracts executed, such as deeds of land or conveyances of personal property, they will generally be deemed to be ratified, and will thus become just as valid and effectual as the contracts of an adult, unless they be disaffirmed by the infant before he arrives at age, or within a reasonable time thereafter.

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such a purchase that the formal leave to buy, which is usually granted to the parties in a foreclosure or partition sale, has been inserted in the judgment. Such a provision is inserted merely to obviate the technical rule that parties to the action cannot buy, and is not intended to determine equities between the parties to the action, or between such parties and others (Fulton v. Whitney, 66 N. Y. 548; Torrey v. Bank of Orleans, 9 Paige [N. Y.] 649; Conger v. Ring, 11 Barb. [N. Y.] 356). But where the trustee has an interest to protect by bidding at the sale of the trust property, and he makes special application to the court for permission to bid, which, upon the hearing of all the parties interested, is granted by the court, then he can make a purchase which is valid and binding upon all the parties interested, and under which he can obtain a perfect title. (De Caters v. De Chaumont, 3 Paige [N.Y.] 178; Gallatian v. Cunningham, 8 Cow. [N. Y.] 361; Davoue v. Fanning, 2 Johns. Ch. [N. Y.] 251; Bergen v. Bennett, 1 Cai. Cas. in Error [N. Y.] 1, 20; Chapin v. Weed, 1 Clarke's Ch. [N. Y.] 464, 469; Colgate's Exr. v. Colgate, 23 N. J. Eq. 372; Froneberger v. Lewis, 79 N. C. 426; Faucett v. Faucett, 1 Bush [Ky.] 511; Michoud v. Girod, 4 How. 503; Campbell v. Walker, 5 Ves. Jr. 678; Farmer v. Dean, 32 Beav. 327; Potter's Willard's Eq. Jur. 607; Lewin on Trusts [7th ed.] 443; Godefroi on Trusts, 184). Here, upon notice to all the beneficiaries, an order was made allowing these appellants to bid. After they had made their bids and signed the terms of sale, a further hearing was had upon notice to all the parties as to the fairness of the sales and the adequacy of the prices, and the sales were approved and confirmed by the court. Under such circumstances there can be no doubt that these appellants would get a good and perfect title to the lands purchased by them, and their title would be good, not only as against all the living parties to the suit, but as against unborn grandchildren, if any such should hereafter come into being. (Code of Civ. Pro., §§ 1557, 1577.)"

[1] See Jackson v. Van Dalfsen, 5 Johns. (N. Y.) 43; Lothrop v. Wightman, 41 Pa. St. 297; Litchfield v. Cudworth, 15 Pick. (Mass.) 24.

[2] 96 N. Y. 211.

She did not disaffirm the contract in her life-time, and left it in full force at her death. Nor even if they could, did her husband or children disaffirm it after her death. There is no rule of law which will allow her husband's assignees or his creditors to disaffirm it. The defense of infancy is for the benefit and protection of infants, and other persons cannot set it up for their own benefit." It seems to be reasonable, and the authorities hold that where the sale of the property is precipitated by a violation or omission of a duty which rests upon a party in respect to the property of another, the person guilty of the breach of duty is absolutely disqualified from becoming a purchaser on his own account.[1]

§ 488. **Ratification of infant's voidable act.**—The *onus* of showing a ratification rests upon the party asserting it.[2] It may be stated as a general principle, deducible from the leading case of Whitney v. Dutch,[3] that the terms of the ratification by an infant need not be such as to impose a direct promise to pay. All that is necessary is that he should expressly agree to ratify his contract, not by doubtful acts such as payment of part of the money due or the interest, but by words, oral or in writing, which import a recognition and a confirmation of his promise. Hence it was held in the case just cited, that where the defendant, when called upon to pay the demand, acknowledged that the money was due, and promised that he would endeavor to procure the money on his return home, this was sufficient to justify a finding of a jury that he assented to and ratified the original promise. Zouch v. Parsons[4] is referred to in Whitney v. Dutch, and Chief-Justice Parker said that the rule stated by Lord Mansfield in that case, to the effect that whenever the act done may be for the benefit of the infant, it shall not be considered void, but that he shall

[1] Bennett v. Austin, 81 N. Y. 308.
[2] Walsh v. Powers, 43 N. Y. 26.
[3] 14 Mass. 457; s. c. 7 Am. Dec. 229, and note p. 234.
[4] 3 Burr. 1804.

have his election when he comes of age, to affirm or avoid it, is the only clear and definite proposition that can be extracted from the authorities.[1] Where an infant made a mortgage of his land and after coming of age conveyed the land subject to the mortgage, the deed was holden to confirm and make good the mortgage.[2]

§ 489. **No ratification of void acts.**—As elsewhere shown, it is held in a great number of cases that an infant's power of attorney is absolutely void.[3] Authorities following this ruling out to its legitimate results may be found in this country and in England. Thus Parke, B., referring to an infant's appointment of an agent, said: "It does not bind the infant, *neither does his ratification bind him.*"[4] So, in Trueblood v. Trueblood,[5] an infant's bond signed by his agent was declared void. Perkins, J., said: "The bond of his [the infant's] agent, or one having assumed to act as such, is void, and not capable of being ratified";[6] and a void deed cannot be confirmed.[7] It may be asserted as a general rule that "no number of subsequent promises to pay can infuse vitality into a contract originally void by the policy of the law."[8] Thus where A. agreed to pay B. one-half of the profits of an office if B. would withdraw as an applicant, and after A. was appointed the promise was renewed, it was held that the new promise was void.[9] So a promise to pay a bill for lobbying services is void though made after the rendition of the services.[10] And where A.

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[1] See § 450. A deed of land by an insane person is voidable only and not void, and may therefore be ratified by him when he is of sane mind. Wait v. Maxwell, 5 Pick. (Mass.) 217; Arnold v. Richmond Iron Works, 1 Gray (Mass.) 434.

[2] Boston Bank v. Chamberlin, 15 Mass. 220.

[3] See § 454.

[4] Doe *d.* Thomas v. Roberts, 16 M. & W. 778.

[5] 8 Ind. 198.

[6] See Hiestand v. Kuns, 8 Blackf. (Ind.) 348; Cummings v. Powell, 8 Texas 88.

[7] Chess v. Chess, 1 P. & W. (Pa.) 32; S. C. 21 Am. Dec. 350.

[8] Firemen's Charitable Ass'n v. Berghaus, 13 La. Ann. 209, 210.

[9] Hunter v. Nolf, 71 Pa. St. 282.

[10] McKee v. Cheney, 52 How. Pr. (N. Y.) 144. See Lyon v. Mitchell, 36 N. Y. 241.

withdrew his candidacy in favor of B., who agreed to pay his expenses thus far incurred and the expenses that might be thereafter incurred in running for another office, a promise of payment made after the election was considered void.[1]

§ 490. **Ratifying void bill of lading.**—A bill of lading signed by an agent, when no goods have been received for shipment, is not considered binding upon the principal.[2] It does not follow, however, that the principal is not bound by the bill of lading if the goods be in fact subsequently delivered to be transported according to the terms of the contract. There is no element of illegality in the contract or any such vice that it is void and incapable of confirmation by acts of the parties done for that purpose; and the old bill of lading is as good as a new one issued on delivery of the goods if the parties choose to make it so.[3]

§ 491. **Facts insufficient to constitute ratification by acquiescence.**—As a general rule simply remaining passive and silent, if not for an unreasonable length of time, cannot be construed into an acquiescence in or ratification of a voidable act.[4] This question came up in a recent case before the New York Court of Appeals. Chief-Justice Church said: "Mere acquiescence for three years after arriving at age, without any affirmative act, was not a ratification."[5] In Boody v. McKenney,[6] the court, in speaking of affirmance or disaffirmance by an infant, said: "The mere acqui-

[1] Robinson v. Kalbfleisch, 5 T. & C. (N. Y.) 212.

[2] Pollard v. Vinton, 105 U. S. 7; Iron Mountain Railway v. Knight, 122 U. S. 87; Schooner Freeman v. Buckingham, 18 How. 182; *contra*, Armour v. Mich. Central R.R. Co., 65 N. Y. 111; Bank of Batavia v. New York, L. E. & W. R.R. Co., 106 N. Y. 195.

[3] Robinson v. Memphis & C. R.R. Co., 16 Fed. Rep. 60. See The Idaho, 93 U. S. 575.

[4] Baker v. Disbrow, 3 Redfield (N. Y.) 360; Pinckney v. Pinckney, 2 Rich. Eq. (S. C.) 219.

[5] Green v. Green, 69 N. Y. 557; below, 7 Hun (N. Y.) 492, and see cases cited in opinion of Gilbert, J., and in the dissenting opinion of Smith, J. Compare Sparman v. Keim, 83 N. Y. 245.

[6] 23 Me. 523.

escence for years to disaffirm it, affords no proof of a ratification. There must be some positive and clear act performed for that purpose. The reason is, that by his silent acquiescence he occasions no injury to other persons, and secures no benefits or new rights to himself. There is nothing to urge him as a duty toward others to act speedily. Language appropriate in other cases requiring him to act within a reasonable time, would become inappropriate here. He may, therefore, after years of acquiescence, by an entry or by a conveyance of the estate to another person, disaffirm and avoid the conveyance made during his infancy."[1] But a retention of the property, and an omission to disaffirm *within a reasonable time* after arriving at the age of twenty-one years, will operate as an affirmance of the contract, and constitute an answer to the defense of infancy.[2]

§ 492. **Lord Tenterden's Act.**—An infant though allowed as a personal privilege the right to avoid certain of his acts or contracts on the ground of lack of experience and absence of judgment and discretion at the time of entering into them, may, when he reaches mature years, at the promptings of interest or conscience, affirm, assume, or ratify such acts. The voidable acts so ratified constitute a sufficient consideration for the new promise. Exactly what should be considered a sufficient ratification or new promise has led to much discussion and conflict of opinion in the cases. With a view of settling the discussion, Lord Tenterden's act was passed, providing that "no action shall be maintained whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification after full age of

[1] Citing Jackson v. Carpenter, 11 Johns. (N. Y.) 539; Curtin v. Patten, 11 S. & R. (Pa.) 311; Tucker v. Moreland, 10 Peters 58.

[2] Walsh v. Powers, 43 N. Y. 26; Kline v. Beebe, 6 Conn. 494; Cecil v. Salisbury, 2 Vernon 224.

any promise or simple contract made during infancy, unless such promise or ratification shall be made by some writing signed by the party to be charged therewith."[1] Statutory provisions practically modelled upon this act may be found in some of our States.[2]

§ 493. **Affirmance by retention of the property.**—Nelson, J., in Delano v. Blake,[3] said: "The purchase by an infant of real estate is voidable, but it vests in him the freehold until he disagrees to it, and the continuance in possession after he arrives of age is an implied confirmation of the contract."[4] So, in the case of a lease to an infant, the continuance in possession after the party becomes of age is a confirmation, and he must pay the rent.[5] Ratification of a conveyance is a ratification of a mortgage made to secure payment of the purchase-money.[6] Davies, J., in Henry v. Root,[7] learnedly discusses the principles applicable to an infant's affirmance of a contract to purchase land. It appeared that the infant had purchased real estate, and had retained possession of it after reaching his majority, and yet by interposing a plea of infancy sought to avoid payment of the purchase-money.[8] This case, it may be observed, must be carefully distinguished from those elsewhere cited, to the effect that where the infant has wasted the consideration or avails of the

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[1] Stat. 9 Geo. IV., c. 14, § 5 (1828).

[2] See, *e. g.*, Thurlow v. Gilmore, 40 Me. 378.

[3] 11 Wend. (N. Y.) 86. See Henry v. Root, 33 N. Y. 551.

[4] See Flinn v. Powers, 36 How. Pr. (N. Y.) 298; s. c. below, 53 How. Pr. (N. Y.) 279; s. c. 54 Barb. (N. Y.) 550; rev'd *sub nomine*, Walsh v. Powers, 43 N. Y. 26; Lynde v. Budd, 2 Paige (N. Y.) 191; Lawson v. Lovejoy, 8 Me. 405; Boody v. McKenney, 23 Me. 517; Robinson v. Hoskins, 14 Bush (Ky.) 393.

[5] Bac. Ab. tit. Infant, 611, 612; Holmes v. Blogg, 8 Taunt. 35.

[6] Young v. McKee, 13 Mich. 552.

[7] 33 N. Y. 526.

[8] The principle is firmly established that the infant on attaining full age cannot hold onto the purchase and thus affirm it, and plead his infancy to avoid the payment of the purchase-money. Henry v. Root, 33 N. Y. 553; Kline v. Beebe, 6 Conn. 494; Bigelow v. Kinney, 3 Vt. 353; Cheshire v. Barrett, 4 McCord's (S. C.) Law 241; Lynde v. Budd, 2 Paige (N. Y.) 191; Badger v. Phinney, 15 Mass. 359.

property, his right of disaffirmance or avoidance is not lost. Here the infant sought to retain possession of the property, and repudiate payment of the purchase-money. In other words, he tried to use his privilege as a sword. The argument was adopted in this case, that the contracts of infants were voidable as distinguished from void, and were only suspended during his minority, and might be revived and ratified by him on arriving at age, upon the same principles, and for the same reasons, and by the same means as a debt barred by the statute of limitations may be revived and restored to its pristine vigor and efficacy.[1]

A new promise, positive and precise, equivalent to a new contract, is not now essential; but a ratification or confirmation of what was done during minority is sufficient to make the contract obligatory. These words "ratify" or "confirm" necessarily import that there was something in existence to which ratification or confirmation could attach, entirely ignoring, therefore, the notion that an in-

[1] See Stone v. Wythipol, Cro. Eliz. 126; Morning v. Knop, Cro. Eliz. 700; Thrupp v. Fielder, 2 Esp. 628. This action was assumpsit, and plaintiff proved payment of £40 on account of the bill since defendant came of age, and contended that this admission by the defendant of his liability to pay was tantamount to a new promise. Lord Kenyon said: "This is not such a promise as satisfies the issue. The case of infancy differs from the statute of limitations; in the latter case a bare acknowledgment has been held to be sufficient. In the case of an infant I shall hold an acknowledgment not to be sufficient, and require proof of an express promise to pay, made by the infant after he has attained that age when the law presumes that he has discretion." The court in Henry v. Root, 33 N. Y. 540, observes, however, that cases like this proceeded upon the principle that the obligations of the infant were void, and that on his attaining his majority he was as much discharged from them on that ground as a bankrupt is by his discharge under the bankrupt or insolvent laws. See Rogers v. Hurd, 4 Day (Conn.) 57; Benham v. Bishop, 9 Conn. 333; Wilcox v. Roath, 12 Conn. 550; Smith v. Mayo, 9 Mass. 62. In Whitney v. Dutch, 14 Mass. 460, Chief-Justice Parker said: "But the terms of the ratification need not be such as to import a direct promise to pay. All that is necessary is that he expressly agrees to ratify his contract, not by doubtful acts, ... but by words, oral or in writing, which import a recognition and a confirmation of his promise." See Thompson v. Lay, 4 Pick. (Mass.) 48; Reed v. Batchelder, 1 Metc. (Mass.) 559; Hall v. Gerrish, 8 N. H. 374; Robbins v. Eaton, 10 N. H. 561.

fant's obligations or contracts were discharged or extinguished by reason of the state of infancy.[1]

§ 494. **Affirmance of voidable corporate acts.**—The doctrine of equitable estoppel applies as well to members of a corporate body as to persons acting in a private capacity.[2] In the case just cited in the New York Court of Appeals, it appeared that a corporation had transferred all its property, thus rendering it practically impossible for the corporation to continue the business for which it was originally incorporated, and inflicting upon it virtual political death. It was contended that the act was *ultra vires*. The court, Tracy, J., delivering the opinion, said: "The act was not illegal. In transferring the property of the corporation to pay its debt the trustees believed that they were acting within the scope of their authority, and the defendant accepted the transfer and received the property in satisfaction of its claim against the plaintiff, in the honest belief that it thereby acquired good title thereto. If the trustees had no power, as the agents of the corporation, to transfer all its property, thereby depriving it of the means of carrying on the business for which it was organized, it is but the case of an agent making a contract in excess of his authority. The act is voidable, not void. The principal may, nevertheless, affirm the act, and a ratification is equivalent to a prior authorization. If all the stockholders of this corporation had, with full knowledge, subsequently ratified the transfer and affirmed the settlement, the act, though beyond the power given the trustees by the charter, could not be subsequently avoided by the stockholders or by the corporation." Thus, in Kent v. The Quicksilver Mining Company,[3] it was held that the acts of

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[1] Henry v. Root, 33 N. Y. 545.

[2] Sheldon H. B. Co. v. Eickemeyer H. B. M. Co., 90 N. Y. 613. See 2 Story's Eq. Jur. § 1539.

[3] 78 N. Y. 159. See Sheldon H. B. Co. v. Eickemeyer H. B. M. Co., 90 N. Y. 612.

a corporation which are not *per se* illegal, or *malum prohibitum*, but which are *ultra vires*, affecting, however, only the interests of the stockholders, may be made good by the assent of the stockholders, so that a stranger to them, dealing in good faith with the corporation, will be protected in a reliance on these acts. A municipal corporation may adopt and ratify a contract made by its engineer in excess of his authority.[1]

A subsequent ratification cannot make valid an unlawful act beyond the scope of corporate authority. An absolute excess of authority by the officers of a corporation, in violation of law, cannot be upheld, and where the officers of such a body fail to pursue the strict requirements of a statutory enactment, under which they are acting, the corporation is not bound. In such cases the statute must be strictly followed; and a person who deals with a municipal body is obliged to see that its charter has been fully complied with. When this is not done, no subsequent act can make the contract effective.[2]

§ 495. **Affirmance effected by laches.**—In Smallcombe's Case,[3] Lord Romilly, Master of the Rolls, declared that lapse of time and acquiescence on the part of the party whose interests are alleged to have been injuriously affected by irregular proceedings, will be a complete bar, unless the transaction is tainted with fraud involving grave moral guilt. Upon this ground an agreement between the shareholders and directors of a joint-stock company was upheld, although admitted to have been originally *ultra vires*, and although the books of the company, accessible to the shareholders, did not show the real nature of the transac-

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[1] McKnight v. City of Pittsburgh, 91 Pa. St. 273. Compare Veeder v. Mudgett, 95 N. Y. 310.

[2] Smith v. City of Newburgh, 77 N. Y. 136; Peterson v. The Mayor, etc., 17 N. Y. 449; Cowen v. Village of West Troy, 43 Barb. (N. Y.) 48; Brown v. The Mayor, 63 N. Y. 239, 244; Dillon on Mun. Corp. 463; McDonald v. The Mayor, 68 N. Y. 23, 27.

[3] L. R. 3 Eq. Cas. 769.

tion. This case was affirmed in the House of Lords.[1] In cases of actual fraud the courts of equity feel great reluctance to interfere where the party complaining does not apply for redress at the earliest convenient moment after the actual character of the fraudulent transaction comes to his knowledge. The party upon whose rights or interests a fraud is committed should not be allowed, after the fact comes to his knowledge, to speculate upon the possible advantages to himself of confirming or repudiating the transaction. He must repudiate at once and surrender his securities.[2] The lapse of twenty years is probably the shortest period which would constitute an absolute bar to the right to avoid a sale for breach of trust.[3] A resale was refused after sixteen years[4] in one case, and after eighteen years in another,[5] while on the other hand the sale was set aside, in Hatch v. Hatch,[6] after the lapse of twenty years, in Dobson v. Racey[7] after twenty-seven years, and in Purcell v. McNamara[8] after seventeen years. Each case must be regulated by its special circumstances. It is regarded as dangerous to accept a title of this character, for "infancy, ignorance, concealment, or misrepresentation might come to explain and excuse the delay, and prevent it from amounting to acquiescence."[9] It may be observed that mere silence will not amount to the ratification of an unauthorized lease executed by the officers of a corporation.[10]

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[1] Evans v. Smallcombe, L. R. 3 H. L. 249. See, also, Brotherhood's Case, 31 Beav. 365.

[2] Sheldon H. B. Co. v. Eickemeyer H. B. M. Co., 90 N. Y. 617. See Parks v. Evansville, etc. R.R. Co., 23 Ind. 567; Perrett's Case, L. R. 15 Eq. Cas. 250.

[3] See People v. Open Board of Brokers, 92 N. Y. 103, reviewing the cases; Hawley v. Cramer, 4 Cow. (N. Y.) 735.

[4] Bergen v. Bennett, 1 Cai. Cas. in Er. (N. Y.) 1.

[5] Gregory v. Gregory, 1 G. Coop. 201.

[6] 9 Ves. 292.

[7] 3 Sandf. Ch. (N. Y.) 60.

[8] 14 Ves. 91.

[9] Finch, J., in The People v. Open Board of Brokers, 92 N. Y. 104.

[10] Kersey Oil Co. v. Oil Creek and Allegheny R.R. Co., 34 Leg. Int. (Pa.) 362.

CHAPTER IV.

AVOIDANCE OF VOIDABLE ACTS.

§ 496. Disaffirmance or avoidance by infant a personal privilege.
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498. General requisites of acts of avoidance as compared with acts of confirmation.
499. Avoidance by infant of voidable acts.
500. Avoidance of infant's deed of land.
501. A sufficient avoidance of an infant's deed.
502. Fraudulent acts or suppression by infant.
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§ 505. Laches of infant affecting avoidance.
506. Avoidance of infant's personal contracts.
507. Restitution by infant.
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509. Avoidance in equity of lunatic's acts.
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510*a*. General rules as to restitution.
511. Personal representative cannot avoid his own voidable act.
512. Avoidance or cancellation of void or voidable instruments.
513. Distinction between instruments affecting realty and personalty.

§ 496. **Disaffirmance or avoidance by infant a personal privilege.**—The general and familiar rule is that the legal privileges of infancy are personal to the infant and that no third person can take any advantage of them, and therefore, the infant's contracts, although voidable by him, are binding upon the persons *sui juris* with whom he contracts.[1] Hence it was decided in Oliver v. Houdlet,[2] that a guardian had no power or authority to avoid

[1] Oliver v. Houdlet, 13 Mass. 237; S. C. 7 Am. Dec. 134; Beardsley v. Hotchkiss, 96 N. Y. 211. See Kendall v. Lawrence, 22 Pick. (Mass.) 543; Holmes v. Rice, 45 Mich. 142; Fisk v. Fisk, 9 Weekly Dig. (N. Y.) 172; Van Bramer v. Cooper, 2 Johns. (N. Y.) 279; Slocum v. Hooker, 13 Barb. (N. Y.) 536; Yates v. Lyon, 61 N. Y. 344. Judge Story observes that "the disabilities of an infant are intended by law for his own protection, and not for the protection of the rights of third persons; and his acts may therefore in many cases be binding upon him, although the persons under whose guardianship, natural or positive, he then is, do not assent to them." United States v. Bainbridge, 1 Mason 83.

[2] 13 Mass. 237.

a voidable act of his ward. In the later case of Chandler v. Simmons[1] it was said that the rule that the guardian of a minor cannot disaffirm his ward's contract must go upon the theory that the minor ought to have the personal right of electing, after coming of age, whether he will ratify or avoid such acts, and that it would be inconsistent with and destructive of this privilege to permit the guardian to annul such contracts before the ward attained his majority and exercised his mature discretion upon the transaction. In this very case, however, it was held that this prohibition did not extend to a guardian appointed for a party as a spendthrift, after his coming of age, and that the guardian in such a case might avoid the acts and contracts of his ward entered into during infancy as fully as might the ward himself. The general principle already enunciated, that the avoidance of a voidable act rests with the person injured or prejudiced, is peculiarly applicable to infants.[2] The vendor cannot avoid an infant's purchase on that ground,[3] and a stranger, especially if a wrong-doer,[4] will not be heard to impeach an infant's conveyance.[5] So infancy is no defense or protection to the infant's sureties or indorsers,[6] and the copartners of an infant cannot exercise his right of disaffirmance for their own benefit,[7] and the disaffirmance cannot be made by creditors.[8] The right of disaffirmance, however, has been extended to the infant's executors and administrators[9] and to his privies in blood,

[1] 97 Mass. 511.

[2] Keane v. Boycott, 2 H. Bla. 511; Slocum v. Hooker, 13 Barb. (N. Y.) 536; Alsworth v. Cordtz, 31 Miss. 32; Oliver v. Houdlet, 13 Mass. 237; Jefford's Admr. v. Ringgold, 6 Ala. 549.

[3] Oliver v. Houdlet, 13 Mass. 237.

[4] Holmes v. Rice, 45 Mich. 142.

[5] Dominick v. Michael, 4 Sandf. (N. Y.) 374.

[6] See Taylor v. Dansby, 42 Mich. 82; Motteux v. St. Aubin, 2 W. Bla. 1133; Jaffray v. Frebain, 5 Esp. 47; Hartness v. Thompson, 5 Johns. (N. Y.) 160; Parker v. Baker, 1 Clarke's Ch. (N. Y.) 136.

[7] Brown v. Hartford Ins. Co., 117 Mass. 479; Winchester v. Thayer, 129 Mass. 129.

[8] Kingman v. Perkins, 105 Mass. 111; McCarty v. Murray, 3 Gray (Mass.) 578; Kendall v. Lawrence, 22 Pick. (Mass.) 540.

[9] Smith v. Mayo. 9 Mass. 62; Jef-

but not to his assignees or privies in estate,[1] and infancy may be pleaded by the committee of an infant lunatic in avoidance of his mortgage, as the committee is a personal representative.[2] Strictly speaking, the privilege of avoidance is not assignable; but where the infant has, by plea or act, disaffirmed the contract, then his privies in estate may avail themselves of the avoidance.[3]

§ 497. **Acts avoided.**—An infant may disaffirm a chattel mortgage executed by him as security for borrowed money, and reclaim the chattels without refunding the money, it not appearing that he is able to make restitution,[4] and may recover money from a broker put up as margin for a stock transaction[5] and lost by the speculation.[6] So an infant partner may rescind his agreement of partnership and recover judgment against his copartner individually for capital paid in by him.[7] "It is clear," says Bayley, J., "that an infant may be in partnership. It is true that he is not liable for contracts entered into during his infancy, but still he may be a partner. If he is, in point of fact, a partner during his infancy, he may, when he comes of age, elect if he will continue that partnership or not. If he continues the partnership, he will then be liable as a partner."[8]

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ford's Admr. v. Ringgold, 6 Ala. 544; Martin v. Mayo, 10 Mass. 137; Parsons v. Hill, 8 Mo. 135; Turpin's Admr. v. Turpin, 16 Ohio St. 270; Person v. Chase, 37 Vt. 647; Ledger Building Ass'n v. Cook, 12 Phila. (Pa.) 434.

[1] Bozeman v. Browning, 31 Ark. 364; Gullett v. Lamberton, 6 Ark. 118; Jefford's Admr. v. Ringgold, 6 Ala. 544; Hoyle v. Stowe, 2 Dev. & Bat. Law (N. C.) 323; Breckenridge's Heirs v. Ormsby, 1 J. J. Mar. (Ky.) 236; Illinois Land Co. v. Bonner, 75 Ill. 315; Nelson v. Eaton, 1 Redf. (N. Y.) 498.

[2] Ledger Building Ass'n v. Cook, 12 Phila. (Pa.) 434.

[3] Shrock v. Crowl, 83 Ind. 244.

[4] Miller v. Smith, 26 Minn. 248; S. C. 37 Am. Rep. 407. See Stafford v. Roof, 9 Cow. (N. Y.) 626; Chapin v. Shafer, 49 N. Y. 407; Bool v. Mix, 17 Wend. (N. Y.) 119; State v. Plaisted, 43 N. H. 413; Randall v. Sweet, 1 Den. (N. Y.) 460.

[5] Heath v. Mahoney, 12 Weekly Dig. (N. Y.) 404.

[6] Ruchizky v. De Haven, 97 Pa. St. 202.

[7] Sparman v. Keim, 83 N. Y. 245; S. C. 9 Abb. N. C. 1, note; rev'g S. C. 44 Super. Ct. (N. Y.) 163; Everett v. Wilkins, 29 Law Times (N. S.) 846; Corpe v. Overton, 10 Bing. 252; Skinner v. Maxwell, 66 N. C. 45.

[8] Goode v. Harrison, 5 Barn. & Ald. 157. See Dunton v. Brown, 31 Mich. 182.

§ 498. **General requisites of acts of avoidance as compared with acts of confirmation.**—The reason is apparent for the distinction in quality and character between acts of avoidance and acts of confirmation. The infant's deed vests the title to the land in his grantee; hence, if the deed is avoided, the ownership of the land is re-transferred. The seizin is changed. There is fitness in the rule that the title to land shall not pass by acts less solemn than a deed; that its ownership shall not be divested by anything inferior to that which conferred it. On the other hand, a confirmation passes no title; it effects no change of property; it disturbs no seizin. It is therefore itself an act of a character less solemn than the act of avoiding a deed, and it may well be effected in a less formal manner.[1]

§ 499. **Avoidance by infant of voidable acts.**—A leading case embodying the law as to the avoidance of his deed or other contract by an infant, is Tucker v. Moreland.[2] Mr. Justice Story, in delivering the opinion of the court, said: "There is no doubt that an infant may avoid his act, deed, or contract, by different means, according to the nature of the act and the circumstances of the case. He may sometimes avoid it by matter *in pais*, as in case of a feoffment by an entry, if his entry is not tolled; sometimes by plea, as when he is sued upon his bond or other contract; sometimes by suit, as when he disaffirms a contract made for the sale of his chattels, and sues for the chattels; sometimes by a writ of error, as when he has levied a fine during his nonage. . . . . The general result seems to be that where the act of the infant is by matter of record, he must avoid it by some act of record (as, for instance, by a writ of error, or an *audita querela*) during his minority. But if the act of the infant is a matter *in pais* it may be avoided by an act *in pais* of equal solemnity or notoriety; and this, according to some authorities, either during his nonage or

[1] Irvine v. Irvine, 9 Wall. 628.

[2] 10 Peters 59.

afterwards; and according to others, at all events, after his arrival of age."[1]

§ 500. **Avoidance of infant's deed of land.**—Whatever may be the true principle of law applicable to the right of disaffirmance of an infant's personal contracts, it seems to be established that the infant's conveyance of land cannot be conclusively avoided until after the infant has attained his majority.[2]

§ 501. **A sufficient avoidance of an infant's deed.**—A conveyance of land may be avoided by an infant by actual entry, ejectment, writ, *dum fuit infra aetatem*, by another absolute conveyance after attaining majority, or by any act manifesting unequivocally his intention to avoid it.[3] In Green v. Green[4] it was held that a re-entry made by the infant, with the purpose of disaffirming the deed, and with notice of his intention, was sufficient to avoid it, and that the grantee could not maintain trespass for such a re-entry.[5] In Arkansas an infant has seven years after coming of age in which to disaffirm his deed.[6] In New York

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[1] See S. C. 1 Am. Lead. Cases, 230, especially the learned note beginning at page 243.

[2] See Philips v. Green, 3 A. K. Marsh. (Ky.) 7; S. C. 13 Am. Dec. 124, and note at p. 132. See also note to Tucker v. Moreland, 1 Am. Leading Cases 257; Roof v. Stafford, 7 Cowen (N. Y.) 183; Bool v. Mix, 17 Wend. (N. Y.) 119; Matthewson v. Johnson, 1 Hoff. Ch. (N. Y.) 560; Hastings v. Dollarhide, 24 Cal. 195; Dunton v. Brown, 31 Mich. 182; Dixon v. Merritt, 21 Minn. 196; Bozeman v. Browning, 31 Ark. 364; Wallace v. Latham, 52 Miss. 291; Cummings v. Powell, 8 Texas 80; Sims v. Everhardt, 102 U. S. 300.

[3] See Philips v. Green, 3 A. K. Marsh. (Ky.) 7; S. C. 13 Am. Dec. 124, 132, note; Tucker v. Moreland, 1 Am. Lead. Cases 257; Roberts v. Wiggin, 1 N. H. 73; S. C. 8 Am. Dec. 38; Bingham v. Barley, 55 Texas 281; S. C. 40 Am. Rep. 801; Irvine v. Irvine, 9 Wall. 617; Dixon v. Merritt, 21 Minn. 196; Hastings v. Dollarhide, 24 Cal. 195; Mustard v. Wohlford, 15 Gratt. (Va.) 329; Bool v. Mix, 17 Wend. (N. Y.) 120; Green v. Green, 69 N. Y. 553; Scott v. Buchanan, 11 Humph. (Tenn.) 469; Drake v. Ramsay, 5 Ohio 251; Cresinger v. Welch, 15 Ohio 196; Norcum v. Sheahan, 21 Mo. 25; Nathans v. Arkwright, 66 Ga. 179; Scranton v. Stewart, 52 Ind. 69; Illinois Land Co. v. Bonner, 75 Ill. 515; Allen v. Poole, 54 Miss. 323.

[4] 69 N. Y. 553.

[5] See Bool v. Mix, 17 Wend. (N. Y.) 120.

[6] Kountz v. Davis, 34 Ark. 590.

it is said that the contract may be avoided within a reasonable time after the infant reaches his majority.[1] This case relates to personalty. What is a reasonable time within which the infant may make the election as to disaffirmance is nowhere determined in such a manner as to furnish a rule applicable to all cases.[2] The question must always be answered in view of the peculiar circumstances of each case.[3] "It must be admitted," said Strong, J., in Sims v. Everhardt,[4] "that generally the disaffirmance must be within the period limited by the statute of limitations for bringing an action of ejectment. A much less time has in some cases been held unreasonable. It is obvious that delay in some cases could have no justification, while in others it would be quite reasonable." In Nathans v. Arkwright[5] the court held that an infant remainderman would not be excused from disaffirming his deed within a reasonable time after attaining his majority merely because his right to bring ejectment for the land had not accrued. In this case it was said that a reasonable time would not exceed seven years after the disability was removed, and that ignorance of the true status of the transaction was no protection against the lapse of time. This is upon the theory that a suit is not necessary to effect a disaffirmance; the right of disaffirmance might have been exercised before the right to bring ejectment and entirely independent of it.

§ 502. **Fraudulent acts or suppression by infant.**—Fonblanque says:[6] "When a man has a title, and knows of it, stands by and either encourages or does not forbid the purchase, he shall be bound, and all claiming under him; neither shall infancy or coverture be an excuse in such case." This principle is recognized in Spencer v. Carr,[7] though

[1] Chapin v. Shafer, 49 N. Y. 407.
[2] Sims v. Everhardt, 102 U. S. 309.
[3] State v. Plaisted, 43 N. H. 413; Jenkins v. Jenkins, 12 Iowa 195.
[4] 102 U. S. 309.
[5] 66 Ga. 179.
[6] Fonbl. Eq. 163.
[7] 45 N. Y. 408.

the infant in that case was held not to be estopped, as there was an absence of proof of intentional fraud on her part. In the opinion a case is referred to where an infant over seventeen years of age had received the full consideration for a lease assigned by his guardian, and afterward sought to avoid it, and demised the lands to another, yet it was held that equity would compel him to execute the lease or pay back the money.[1] King, Chancellor, said: "Infants have no privilege to cheat men." In another case[2] an infant, then twenty years of age, was employed by his father to raise money upon land which the father claimed to own in fee. The money was obtained, the infant being very active in procuring it and witnessing the mortgage. After the father's death the infant set up, as the fact was, that he had a remainder in the land after his father's death, and insisted that the mortgage was not valid as against him. It was shown that the infant knew of his title at the time the loan was consummated. The Lord Chancellor overruled the defense, holding that if the infant was old and cunning enough to contrive and carry on a fraud, he ought in equity to make satisfaction for it.[3]

§ 503. Effect of inertness or silence.—The principle of these cases must be carefully distinguished from cases where there has been nothing more than mere silence on the part of the infant. In such cases, as we have said, his right to avoid his conveyance of land after coming of age is not barred until the statute of limitations destroys his remedy.[4] Such is in effect the ruling in cases like Irvine v. Irvine,[5] Prout v. Wiley,[6] and Lessee of Drake v. Ramsay.[7] It is held in Sims v. Everhardt,[8] that the cases hold-

[1] Evroy v. Nicholas, 2 Eq. Cas. Ab. 488.

[2] Watts v. Creswell, 2 Eq. Cas. Ab. 515.

[3] See Savage v. Foster, 9 Mod. 35; Beckett v. Cordley, 1 Bro. C. C. 353; 2 Kent's Com. 241; also note to Norris v. Wait, 44 Am. Dec. 283.

[4] Sims v. Everhardt, 102 U. S. 312.

[5] 9 Wall. 617.

[6] 28 Mich. 164.

[7] 5 Ohio 251.

[8] 102 U. S. 312.

ing that silence during a much less period of time will be held to be a confirmation of the voidable deed, either rely upon Holmes v. Blogg,[1] which was not a case of an infant's deed, or subsequent cases decided on its authority, or they rest in part upon other circumstances than mere silent acquiescence, such as standing by without speaking while the grantee made improvements, or making use of the consideration. Strong, J., said: "We think the preponderance of authority is that, in deeds executed by infants, *mere* inertness or silence continued for a period less than that prescribed by the statute of limitations, unless accompanied by affirmative acts, manifesting an intention to assent to the conveyance, will not bar the infant's right to avoid the deed."[2]

§ 504. **No estoppel against infants.**—The books are replete with cases in which it has been sought to establish an estoppel against an infant. The question came up in Sims v. Everhardt,[3] but the court said that there could not be any doubt as to its solution, founded either upon reason or authority. Strong, J., said: "An estoppel *in pais* is not applicable to infants, and a fraudulent representation of capacity cannot be an equivalent for actual capacity.[4] A conveyance by an infant is an assertion of his right to convey. A contemporaneous declaration of his right, or of his age, adds nothing to what is implied in his deed. An assertion of an estoppel against him is but a claim that he has assented or contracted. But he can no more do that effectively than he can make the contract alleged to be confirmed."[5] So, an infant cannot be estopped from assert-

[1] 8 Taunt. 35.

[2] Sims v. Everhardt, 102 U. S. 312. See Wallace v. Latham, 52 Miss. 291; Prout v. Wiley, 28 Mich. 164.

[3] 102 U. S. 313.

[4] Citing Brown v. McCune, 5 Sandf. (N. Y.) 224; Keen v. Coleman, 39 Pa. St. 299.

[5] See Upshaw v. Gibson, 53 Miss. 341; McBeth v. Trabue, 69 Mo. 642; Montgomery v. Gordon, 51 Ala. 377; Ackley v. Dygert, 33 Barb. (N. Y.) 176, 193; Lackman v. Wood, 25 Cal. 147; Conrad v. Lane, 26 Minn. 389. But compare Goodman v. Winter, 64 Ala. 410; Commonwealth v. Shuman,

ing a title to real estate.[1] The doctrine of estoppel is sometimes, however, applied in courts of equity in cases such as have been already noticed.[2] Mr. Bigelow,[3] in speaking of the rule as applicable to infants, says: "We do not say that the test of the existence of an estoppel by conduct depends upon the existence of a right of action for deceit; but we apprehend that while there may be an estoppel without this right of action in some cases, the estoppel always arises where the action of deceit would be maintainable." It may here be observed that minors, whose property has been illegally sold, are not estopped from recovering it because, upon attaining their majority, they received its price without having been informed of the facts connected with the sale.[4]

§ 505. **Laches of infant affecting avoidance.**—The recent case of Newton v. Hammond[5] reaffirms the principle that mere delay by a ward on attaining his majority in compelling his guardian to settle his accounts in the probate court, did not discharge the guardian's sureties, notwithstanding the fact that the guardian may in the meantime have become insolvent. The decision is based upon the theory that the guardian might have been compelled to account after it became his duty so to do, at the instance of the sureties on the bond as well as by the ward, and hence the failure to compel the accounting was as much the negligence of the one as of the other.[6]

§ 506. **Avoidance of infant's personal contracts.**—With regard to the personal contracts of an infant, generally speaking, these may be avoided either before or after his arrival at age.[7] It is difficult to state the exact basis upon which a

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18 Pa. St. 346; Overton v. Banister, 3 Hare 503.

[1] Brumfield v. Boutall, 24 Hun (N. Y.) 456; Sherman v. Wright, 49 N. Y. 227.

[2] See note to Norris v. Wait, 44 Am. Dec. 285; Drury v. Drury, 2 Eden 39.

[3] Bigelow on Estoppel, 3d ed., p. 516.

[4] Self v. Taylor, 33 La. An. 769.

[5] 38 Ohio St. 430.

[6] See § 495.

[7] See Philips v. Green, 3 A. K. Mar. (Ky.) 7; S. C. 13 Am. Dec. 124, note

right of disaffirmance by an infant before attaining his majority is founded. In Sims v. Everhardt (decided in 1880),[1] the court said: "Confirmatory acts must be voluntary. As we have said, one who is under a disability to make a contract cannot confirm one that is voidable, or, what is the same thing, cannot disaffirm it. An affirmance or a disaffirmance is in its nature a mental assent, and necessarily implies the action of a free mind, exempt from all constraint or disability."[2] It is said by a writer[3] that "this distinction appears to be recognized out of regard to the infant's benefit; since land might be recovered after long lapse of time upon disturbing the possessor's title, while personal property would often be utterly lost if one could not trace out and recover it until he became of age." In Towle v. Dresser[4] the court say that they can find no good reason, either upon principle or authority, to deny the power of a minor to rescind an executed sale of personal property upon returning the consideration received. Barrows, J., said: "It is the legitimate use of the shield with which the law covers their supposed want of judgment and experience, and places both parties *in statu quo ante*, a condition of things of which it would seem neither ought

132; Tucker v. Moreland, 1 Am. Lea. Cases, 258; Stafford v. Roof, 9 Cow. (N. Y.) 626; Shipman v. Horton, 17 Conn. 481; Carr v. Clough, 26 N. H. 280; Willis v. Twambly, 13 Mass. 204; Briggs v. McCabe, 27 Ind. 327; Riley v. Mallory, 33 Conn. 201; Monumental Building Association v. Herman, 33 Md. 128; Indianapolis Chair Co. v. Wilcox, 59 Ind. 429; Bailey v. Barnberger, 11 B. Mon. (Ky.) 113; Towle v. Dresser, 73 Me. 257; Gaffney v. Hayden, 110 Mass. 137; s. c. 14 Am. Rep. 580. But see Farr v. Sumner, 12 Vt. 28; Dunton v. Brown, 31 Mich. 182; Boody v. McKenney, 23 Me. 517; In Chapin v. Shafer, 49 N. Y. 412, Peckham, J., said: "Assuming that the mortgage is voidable only, then the mortgagor had a right to avoid it at any time before he arrived at age, and within a reasonable time thereafter, by any act which evinced that purpose (Bool v. Mix, 17 Wend. [N. Y.] 119; Stafford v. Roof, 9 Cow. [N. Y.] 626; State v. Plaisted, 43 N. H. 413), and an unconditional sale of the property is such an act. State v. Plaisted, 43 N. H. 413."

[1] 102 U. S. 312.

[2] See Dunton v. Brown, 31 Mich. 182.

[3] Schouler's Domestic Relations, § 409.

[4] 73 Me. 256.

to complain. By reason of the transitory nature of personal property, to withhold this right from the infant, perhaps for a term of years, until he became of age, would, in many cases, be to make it utterly valueless." The action of the infant in this case was undoubtedly praiseworthy as regards the restoration of the consideration, but we fail to see how this element can affect or overcome the logical objection to the exercise of mental assent sufficient to rescind the contract by a person under disability. Why is not the rescission as voidable as the contract itself?

The avoidance may be effected by any act clearly demonstrating a renunciation of the contract.[1] A parol promise and ratification made by an infant after reaching his majority, to pay a debt not for necessaries, has been held in New York to be valid.[2]

§ 507. **Restitution by infant.**—The election to avoid an infant's acts, frequently brings up the question of the right of the party *sui juris* to claim a restoration of the consideration which the infant may have received from him. An immense amount of confusion has been introduced into this branch of our law, and numerous cases on both sides of the controversy as to the right to restitution might be cited. The New York Court of Appeals in 1877,[3] said that they did not deem it profitable to review the authorities upon the question, but declared that the weight of authority was against the right to exact restitution as a condition precedent to a disaffirmance.[4] The right to repudiate, as we have seen, is based upon the incapacity of the infant to act or contract, and that incapacity must be held

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[1] Tucker v. Moreland, 1 Am. Lead. Cases 258, and cases cited; State v. Plaisted, 43 N. H. 413.

[2] Halsey v. Reid, 4 Hun (N. Y.) 778.

[3] Green v. Green, 69 N. Y. 556.

[4] Citing Tucker v. Moreland, 10 Peters 58–74; Chandler v. Simmons, 97 Mass. 508; Gibson v. Soper, 6 Gray (Mass.) 279; Price v. Furman, 27 Vt. 268; Bartlett v. Drake, 100 Mass. 174. See Mustard v. Wohlford, 15 Gratt. (Va.) 329; Walsh v. Young, 110 Mass. 399.

to relate as well to the avails of the property as to the property itself, and when the avails of the property have been improvidently spent or squandered in speculation, or otherwise lost during minority, the infant should not be held responsible for an inability to restore them. To so hold would operate as a very serious restriction upon the right of an infant to avoid his contract, and in many cases would destroy that right altogether. The right to rescind is established for the protection of the infant, and to make it dependent upon performing an impossibility resulting from acts which the law presumes the infant incapable of performing, would tend to impair the right and withdraw the protection.[1] In Tucker v. Moreland,[2] Judge Story, in speaking of an avoidance of an infant's act, said: "To give effect to such disaffirmance it is not necessary that the infant should first place the other party *in statu quo*." In Hangen v. Hachmeister[3] it is said that it is only where it affirmatively appears that the infant has squandered or lost the money or property during infancy, and is unable to refund, that the court will not compel him to make restitution.

§ 508. **Disaffirmance of lunatic's deed.**—It may be stated, as a general rule, that the grantor in a deed may avoid his conveyance by proof that he was *non compos mentis* at the time of its execution.[4] An insane person is incapable of making a valid deed, for he wants the consenting mind. "The law makes this very incapacity of parties their shield. In their weakness they find protection. It will not suffer those of mature age and sound mind to profit by that weakness. It binds the strong while it protects the weak. It holds the adult to the bargain which the infant may avoid; the sane to the obligation from which the insane may be loosed. It does not mean to put them on an equality. On

[1] Green v. Green, 69 N. Y. 556.
[2] 10 Peters 74.
[3] 16 Weekly Dig. (N. Y.) 553.
[4] Crawford v. Scovell, 94 Pa. St. 48; s. c. 39 Am. Rep. 766; Bensell v. Chancellor, 5 Whart. (Pa.) 371; Gibson v. Soper, 6 Gray (Mass.) 279.

the other hand, it intends that he who deals with an infant or insane person shall do it at his peril. Nor is there practically any hardship in this, for men of sound minds seldom unwittingly enter into contracts with infants or insane persons"[1] Some act of avoidance of the deed must be shown. Thus, in an action by heirs to set aside a conveyance made by their ancestor who was insane, though he had not been judicially declared so, it was held that the deed being voidable only, some act of disaffirmance must have been done either by the ancestor or heirs before suit brought.[2] It may be here observed that ordinarily an administrator has no commission to interfere, and by his election unsettle the landed possessions held by the intestate's heirs through inheritance, on the ground that the ancestor, when he acquired the property, was not of sound mind.[3]

§ 509. **Avoidance in equity of lunatic's acts.**—A court of equity, when its jurisdiction is invoked to set aside deeds and contracts upon the ground of insanity, acts upon equitable principles. It is not a matter of course for a court of equity to set aside and declare void the act of a lunatic executed during his lunacy. It will enforce the universal maxim of that court, that he who seeks equity must do equity. "The Court of Chancery," says Shelford, "will not, as a matter of course, interfere to set aside contracts entered into and completed by a lunatic, even though they be void at law, but the interference of the court will depend very much upon the circumstances of each particular case; and where it is impossible to exercise the jurisdiction in favor of the lunatic so as to do justice to the other party, the court will refuse relief, and leave the lunatic to his remedy (if any) at law."[4]

[1] Gibson v. Soper, 6 Gray (Mass.) 282.

[2] Schuff v. Ransom, 79 Ind. 458.

[3] Campbell v. Kuhn, 45 Mich. 514; s. c. 40 Am. Rep. 479.

[4] Shelford on Lunacy, 418. See also 1 Story's Eq. Jur. § 228; Niell v. Morley, 9 Ves. Jr. 478; Loomis v. Spencer, 2 Paige (N. Y.) 153; Sprague v. Duel, 11 Paige (N. Y.) 480.

§ 510. Restitution by lunatic.—The rule of law with reference to the restitution of the consideration upon the avoidance of a lunatic's contract, is somewhat different from that which governs where infancy exists. Thus in Molton v. Camroux,[1] which was an action to recover money paid for annuities, it was held that when a person apparently of sound mind, and not known to be otherwise, entered into a fair and *bona fide* contract for the purchase of property, which was executed and completed, and the property had been paid for and enjoyed, and could not be restored so as to put the parties *in statu quo*, the contract could not afterward be set aside either by the alleged lunatic or those who represent him. And in Beals v. See[2] the court decided that an executed contract by a merchant for the purchase of goods prior to inquisition could not be avoided by proof of insanity at the time of the purchase, unless fraud was shown or knowledge of the alleged lunatic's condition. The same principle is asserted in Lancaster County National Bank v. Moore.[3] In Crawford v. Scovell[4] the court say that "the consideration need not be restored before commencement of the action, nor after, in all cases. To say that an insane man, before he can avoid a voidable deed, must put the grantee *in statu quo*, would oftentimes be to say his deed shall not be avoided at all. The more insane the grantor was when the deed was made, the less likely will he be to retain the fruits of his bargain so as to be able to make restitution. One of the obvious grounds on which the deed of an insane man is held voidable is not merely the incapacity to make a valid sale, but the incapacity prudently to manage and dispose of the proceeds of the sale. And the same incapacity which made the deed void may have wasted

[1] 2 Exch. 487.
[2] 10 Pa. St. 56.
[3] 78 Pa. St. 407; s. c. 21 Am. Rep. 24.
[4] 94 Pa. St. 52; s. c. 39 Am. Rep. 769.

the price and made the restoration of the consideration impossible."[1]

§ 510*a*. **General rules as to restitution.**—In an article in the Central Law Journal, by Mr. Crosby Johnson,[2] it is said: "When one of the parties to a contract is an infant or insane person, and such contract does not relate to the procuring of necessaries; or where one of the parties is of age and of sound mind, but entered into the contract in consequence of a mistake of fact, or through the fraud of the other party, such contract may be rescinded, provided equity can be done between the parties." Alluding to the return of consideration by infants, the learned writer continues: "The infant is not bound to place the other party *in statu quo* as a condition precedent to the right to rescind. Unless he has the consideration by him received, he is not bound to make any return whatever to the other party.[3] The fact that the infant has so mismanaged or mistreated the property as to depreciate its value and render it worth a great deal less than when it was received by him, will not defeat the right of the infant to rescind the contract.[4] Some of the cases seem to intimate that, although the infant should have the consideration in his hands, he will not be required to make return thereof previous to exercising his privilege of rescinding, but would leave the other party to recover the same as best he could.[5] But that view seems

[1] Citing Gibson v. Soper, 6 Gray (Mass.) 279.

[2] 18 Cent. L. J. 482.

[3] Citing Boody v. McKenney, 23 Me. 517; Hovey v. Hobson, 53 Me. 453; Robinson v. Weeks, 56 Me. 102; Tucker v. Moreland, 10 Pet. 65; Sims v. Everhardt, 102 U. S. 300; Fitts v. Hall, 9 N. H. 441; Price v. Furman, 27 Vt. 268; Richardson v. Boright, 9 Vt. 368; Dana v. Stearns, 3 Cush. (57 Mass.) 372; Walsh v. Young, 110 Mass. 396; Gibson v. Soper, 6 Gray (72 Mass.) 279; Shaw v. Boyd, 5 S. & R. (Pa.) 309; Ruchizky v. De Haven, 97 Pa. St. 202; Manning v. Johnson, 26 Ala. 446; Carpenter v. Carpenter, 45 Ind. 142; Cresinger v. Welch, 15 Ohio 156; Wallace v. Lewis, 4 Harr. (Del.) 75; Miller v. Smith, 26 Minn. 248; s. c. 37 Am. Rep. 407.

[4] Citing White v. Branch, 51 Ind. 210; Whitcomb v. Joslyn, 51 Vt. 79; s. c. 31 Am. Rep. 678. See Betts v. Carroll, 6 Mo. App. 518.

[5] Citing Chandler v. Simmons, 97 Mass. 508; Badger v. Phinney, 15 Mass. 359; Skinner v. Maxwell, 66 N. C. 45.

to convert the shield into a sword. If it is admissible at all, it is only when the infant undertakes to exercise the privilege during the continuance of his infancy. But where he undertakes to exercise the right after attaining his majority, he should be required, as a condition precedent, to return the consideration, or any specific fruits of the consideration, which he may then have in his hands or under his control in as good condition as they were when he became of age.[1] In this way we should escape the presumption that an infant has greater capacity to take care of property and keep it in good condition than he has to purchase such property; and at the same time secure to the other party whatever of judgment or discretion the infant may have actually displayed in his management of the consideration or of its proceeds. Thus the privilege would be preserved free from restriction without converting the shield into a sword."

Referring to restitution by lunatics or their representatives, the same writer observes that if the party having transactions with the lunatic "knew that he was dealing with an insane person, or if the nature of the contract is such as only an imbecile or crazy man would have made, or if an unfair advantage was taken of the lunatic, a return of the consideration will not be exacted.[2] But if the lunatic in fact applied the consideration or any part of it so that it enured to his benefit, he must make restitution to the extent of benefits actually obtained; or if the consideration, or specific fruits of such consideration, be in his hands at the time of rescinding, they should be restored to the

[1] Citing Bartlett v. Cowles, 15 Gray (81 Mass.) 445; Walsh v. Young, 110 Mass. 396; Dill v. Bowen, 54 Ind. 204; Bedinger v. Wharton, 27 Gratt. (Va.) 857.

[2] Citing Nichol v. Thomas, 53 Ind. 42; Gibson v. Soper, 6 Gray (72 Mass.) 279; Halley v. Troester, 72 Mo. 73; Tolson v. Garner, 15 Mo. 494; Crawford v. Scovell, 94 Pa. St. 48; s. c. 39 Am. Rep. 766; Henry v. Fine, 23 Ark. 417; Van Deusen v. Sweet, 51 N. Y. 378; Canfield v. Fairbanks, 63 Barb. (N. Y.) 461; Riggs v. American Tract Soc., 84 N. Y. 330.

other party."[1] The same writer, alluding to the subject of the return of consideration required of a defrauded person, says: "All the cases are agreed that one who was induced to enter into a contract through the fraudulent contrivances or fraudulent representations of the opposite party, may rescind the contract provided he can, by a return of the property received under the contract, place the other party *in statu quo*.[2] An offer to rescind should be accompanied by a tender of the return of the property. Nothing else will absolve the buyer from payment.[3] Unless the consideration is utterly worthless it should be returned."[4] Professor Schouler, referring to the authorities governing the return required in cases of mistake, said:[5] "The rule is as to two innocent parties who have performed acts under a mutual misunderstanding, that the court will allow either to turn back, if he can take the other back with him; in other words, the one party may unravel the contract if he can put the other *in statu quo*. Therefore the buyer of a chattel who would rescind the sale on this ground, and get

[1] Citing Lagay v. Marston, 32 La. Ann. 170; Lincoln v. Buckmaster, 32 Vt. 652; Matthiessen & W. Refining Co. v. McMahon, 38 N. J. L. 536.

[2] Citing Lyon v. Bertram, 20 How. 155; Thurston v. Blanchard, 22 Pick. (Mass.) 18; S. C. 33 Am. Dec. 700; Urquhart v. Macpherson, L. R. 3 App. Cases 831; S. C. 24 Moak 545; Vance v. Schroyer, 79 Ind. 380; Thayer v. Turner, 8 Metc. (49 Mass.) 550; Righter v. Roller, 31 Ark. 170; Freeman v. Reagan, 26 Ark. 373; Ketchum v. Brennan, 53 Miss. 596; Van Trott v. Wiese, 36 Wis. 439; Manahan v. Noyes, 52 N. H. 232; Doll v. Kathman, 23 La. Ann. 486; Latham v. Hicky, 21 La. Ann. 425; Lane v. Latimer, 41 Ga. 171; Estes v. Reynolds, 75 Mo. 563.

[3] Citing Jaggers v. Griffin, 43 Miss. 134.

[4] Citing Morrow v. Rees, 69 Pa. St. 368; Wolf v. Dietzsch, 75 Ill. 205; Jopling v. Dooley, 1 Yerg. (Tenn.) 289; S. C. 24 Am. Dec. 450; Barr v. Baker, 9 Mo. 840. See Sanborn v. Batchelder, 51 N. H. 426; Houghton v. Nash, 64 Me. 477; Spencer v. St. Clair, 57 N. H. 9; Haase v. Mitchell, 58 Ind. 213; Bishop v. Stewart, 13 Nev. 25; Howe Machine Co. v. Rosine, 87 Ill. 105; Blake v. Nelson, 20 La. Ann. 245; Whitcomb v. Denio, 52 Vt. 382; Conner v. Henderson, 15 Mass. 319; S. C. 8 Am. Dec. 103; Bassett v. Brown, 105 Mass. 558; Bartlett v. Drake, 100 Mass. 174; Vance v. Schroyer, 79 Ind. 380; Van Liew v. Johnson, 4 Hun (N. Y.) 415; Herman v. Haffenegger, 54 Cal. 161.

[5] 2 Schouler's Personal Prop. 627.

back his price, must restore the chattel to the seller, unless he can show that it is of no intrinsic value, and its loss no injury to that party."[1]

§ 511. **Personal representative cannot avoid his own voidable act.**—Generally speaking, an administrator who sells, mortgages or pledges any of the personal property of the estate in payment of, or as security for, his own individual debt, is guilty of a breach of trust, but the administrator cannot avoid his own sale or pledge, though he was guilty of a breach of trust in making it. It has been even held that if he dies or is removed and an administrator *de bonis non* is appointed, the latter cannot avoid the wrongful sale or pledge by the first administrator.[2] Creditors, legatees, and distributees are the persons injuriously affected, and are the proper parties to bring suit to have the transactions avoided.

§ 512. **Avoidance or cancellation of void or voidable instruments.**—We have already seen that judgments may be procured cancelling instruments and papers that are absolute nullities, the courts proceeding in such cases upon the principle *quia timet*. "The cases in which a court of equity exercises its jurisdiction to decree the surrender and cancellation of written instruments are, in general, where the instrument has been obtained by fraud, where a defense exists which would be cognizable only in a court of equity, where the instrument is negotiable, and by a transfer the transferee may acquire rights which the present holder does not possess, and where the instrument is a cloud upon the title of the plaintiff to real estate."[3] The distinction in

[1] Citing Clarke v. Dickson, E. B. & E. 148; Blackburn v. Smith, 2 Ex. 783; Dorr v. Fisher, 1 Cush. (Mass.) 271; Smith v. Smith, 30 Vt. 139; Lyon v. Bertram, 20 How. 149.

[2] Stronach v. Stronach, 20 Wis. 133. See Herron v. Marshall, 5 Humph. (Tenn.) 443; Coleman v. McMurdo, 5 Rand. (Va.) 51; Johnston v. Lewis, Rice's Eq. (S. C.) 40; Young v. Kimball, 8 Blackf. (Ind.) 167; Slaughter v. Froman, 5 Monroe (Ky.) 19; Hagthorp v. Neale, 7 G. & J. (Md.) 13.

[3] Rapallo, J., in Town of Venice v. Woodruff, 62 N. Y. 466.

this regard between instruments affecting realty and those relating only to personalty is worthy of notice.[1]

§ 513. Distinction between instruments affecting realty and personalty.—Bills have been filed for the purpose of cancelling promissory notes, bills of exchange, policies of insurance, bonds, etc., as well as deeds, mortgages, and other instruments affecting real estate, and all these have been repeatedly entertained by the courts. There is, however, an obvious distinction between those instruments which merely create a personal claim against a complainant, and those which affect his property, and especially his real estate. The first can rarely do him any injury so long as they remain dormant, while the latter may create such a cloud upon his title as seriously to impair its value.[2] In the first of these two classes of cases, the question is involved in some doubt whether courts of equity will interfere to set aside the instrument where there is a complete defense at law. Lord Thurlow was inclined not to entertain jurisdiction in such cases,[3] but afterward Lord Loughborough in Newman v. Milner,[4] and Lord Eldon in Bromley v. Holland,[5] and in Jervis v. White,[6] took the opposite ground. Chief-Baron Richards also, in Duncan v. Worrall,[7] admitted with apparent reluctance that relief might be given in equity against a policy of insurance, notwithstanding it was entirely void at law. In cases, however, where the title to real estate is or may be affected, it seems never to have been regarded as a sufficient objection to a bill seeking relief in equity that the complainant has a perfect legal defense. The distinction seems to have been practically taken in the case of Byne v. Vivian.[8] This was

[1] Compare Holden v. Hoyt, 134 Mass. 181, 186. See § 418.

[2] Ward v. Dewey, 16 N. Y. 525.

[3] Ryan v. Mackmath, 3 Bro. C. C. 15; Colman v. Sarrel, 1 Ves. 50; Hilton v. Barrow, 1 Ves. 284.

[4] 2 Ves. 483.

[5] 7 Ves. 3.

[6] 7 Ves. 413.

[7] 10 Price 31.

[8] 5 Ves. 604.

a bill to cancel an annuity bond, and came before Lord Chancellor Loughborough in 1800. Three years before, the same learned chancellor had refused in Franco v. Bolton,[1] to set aside a similar bond, although void, on the ground that since the case of Collins v. Blantern[2] the defense was available at law. An examination of the facts in Byne v. Vivian,[3] reveals a plain reason for this apparent inconsistency. The annuity in Franco v. Bolton[4] was secured by a personal bond, while in Byne v. Vivian[5] the bond was accompanied by a mortgage on real estate. In the latter case, Mansfield, counsel for the defendant, urged that the court ought not to entertain jurisdiction, for the reason not only that there was a good defense at law, but that the defense appeared upon the face of the proceedings under which the defendant must claim. Sir John Mitford, on the other hand, pressed the consideration that the security affected the title to real estate. He said: "This is an *incumbrance* upon the estate which cannot be disposed of till this term is disposed of. A court of equity has taken jurisdiction in cases where the security has been void at law. The party has a right to come to have the property *cleared*, and that the other shall not retain the security merely to keep a cloud upon the title."

The distinction between cases where the invalidity of the instrument appears upon its face and where it does not is now universally recognized.[6] But Chancellor Kent, in Hamilton v. Cummings,[7] came to the conclusion, after an elaborate review of the cases, that it was unsound. In Cox v. Clift,[8] Gardiner, J., said: "Whatever opinions may have formerly obtained, it now seems to be established that

[1] 3 Ves. 371.
[2] 2 Wils. 341.
[3] 5 Ves. 604.
[4] 3 Ves. 371.
[5] 5 Ves. 604.
[6] See Simpson v. Lord Howden, 3 Myl. & Cr. 99; Mayor of Brooklyn v. Meserole, 26 Wend. (N. Y.) 136; Van Doren v. Mayor, etc., 9 Paige (N. Y.) 388; Cox v. Clift, 2 N. Y. 118; Peirsoll v. Elliott, 6 Peters 95.
[7] 1 Johns. Ch. (N. Y.) 517.
[8] 2 N. Y. 122.

whenever it is apparent from the writing or deed itself that no danger to the title or interest of the complainant is to be apprehended, a court of equity will not entertain a bill for the cancellation or delivery of the instrument. Nor is there any reason why a party should be allowed to resort to the expensive remedy of a suit in chancery to procure the relinquishment of a right which it is obvious the defendant never possessed, and against which, if asserted, the complainant had a perfect legal defense written down in the title deeds of his adversary."

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Rule 404(b) intent, other acts of fraud about the same time, and as a part of the same scheme of fraud admissible in Evidence. § 203.282.

Relevancy in proving Fraud. Moral Culpability. § 206